Supreme Court of the United States

October Term,

No. [illegible]

THE MINNEAPOLIS & ST. LOUIS RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF MINNESOTA, EX REL. THE RAILROAD AND WAREHOUSE COMMISSION, DEFENDANT IN ERROR.

In Error to the Supreme Court of Minnesota.

BRIEF FOR PLAINTIFF IN ERROR.

ALBERT E. CLARKE,
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SUPREME COURT OF THE UNITED STATES.

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THE CASE.

The St. Paul & Duluth Railroad Company is, and was at all the times referred to in the record of this case, a railroad corporation of the State of Minnesota, owning and operating a line of railroad from Duluth, on Lake Superior, to the cities of St. Paul and Minneapolis. Its local rate upon hard coal in car loads, from Duluth to St. Paul and Minneapolis, was one dollar and twenty-five cents per ton; the justness and reasonableness of which local rate is unquestioned, and is conceded. The Minneapolis & St. Louis Railroad Company is a railroad corporation of said State; and at the time the order of the relator in this proceeding was made, owned and operated a line of railroad extending from Minneapolis

southerly, through Hopkins to Albert Lea, in said State; thence, still southerly, to Angus, in Boone County, in the State of Iowa. At Albert Lea and Angus, it connected with other railroads, and by virtue of traffic arrangements, had and has, access to all the principal markets. It also owned and operated a branch line, extending from a connection with its main line at Hopkins (a station upon its main line nine miles south of Minneapolis), westerly ninety-two miles to Morton, Minnesota; at which last named point it connected with a railroad owned and operated by the Wisconsin, Minnesota Railroad Company, which extended westerly from Morton to Watertown, in the State of South Dakota. Winthrop is a station upon the line of The Minneapolis & St. Louis Railroad, between Hopkins and Morton, sixty miles west of Hopkins.

At the time order involved in this proceeding was made by the relator, the Railroad and Warehouse Commission, the Minneapolis, New Ulm & Southwestern Railroad Company, a railroad corporation of said State, had constructed and owned a line of railroad extending south from Winthrop to New Ulm, in Brown County, in said State. The capital stock of the last named company was owned by the Minneapolis & St. Louis Railroad Company; but it was nevertheless a separate and independent corporation; and it is so stated in the petition for the alternative writ of mandamus, and in the writ itself. (*Page 12, Record.*) As there are some errors in the petition for the alternative writ, as to the location of stations, I append to this brief a small plat illustrative of the situation.

At, and prior to, the commencement of this proceeding, the St. Paul & Duluth Railroad Company, The Minneapolis & St. Louis Railroad Company and the Minneapolis, New Ulm & Southwestern Railroad Company had voluntarily made and put into effect a joint tariff for the transportation of hard coal, in car loads, from the lake port of Duluth, to stations on the line of The Minneapolis & St. Louis, The Minneapolis, New Ulm & Southwestern, and The Wisconsin, Minnesota & Pacific Railroads. The rates under this joint tariff from Duluth, to the stations involved in this proceed-

ing, are correctly shown in Schedule "A," page 26 of the printed Record, and at page 13 of this brief.

In dividing earnings under this joint tariff, there was first set apart to the St. Paul & Duluth Railroad Company *one dollar* per ton, for transporting the hard coal from Duluth to Minneapolis; the remainder being turned over to the one, or more, of the other three companies participating in the carriage of the coal to destination.

On September 22d, 1898, the Railroad and Warehouse Commission of Minnesota, having resolved to investigate the reasonableness of the joint rate referred to, made an order requiring all the railroad companies above named, to answer, as to the reasonableness of such rate, by a time fixed in the order.

The several carriers appeared, and answered that the tariff in force was just and reasonable (Page 13, Par. 5, and page 34, printed Record). On the 19th day of January, 1899, the Railroad and Warehouse Commission made an order whereby it decided and determined that the joint rate, then in force, for transporting hard coal from Duluth to the stations named in Schedule "A," was unreasonable and unjust; and that a reasonable and just rate for such service was the rate set forth in Schedule "B," found at pages 19 and 26 of the printed Record, and at page 13 of this brief, and ordered a reduction accordingly. (Page 26, Record.) The order of the Commission was duly served and promulgated, but was disregarded by the railroads interested.

On March 3d, 1899, the joint tariff which had previously been entered into by the carriers, for the transportation of hard coal between Duluth and the points named in Schedules "A" and "B," was cancelled; and since that date there has been no joint tariff between said points. (*Record, page 108.*)

Subsequently, on April 8, 1899, the Railroad and Warehouse Commission made and entered the order found on pages 20 and 21 of the printed Record, wherein it was recited that the St. Paul & Duluth, The Minneapolis & St. Louis and The Minneapolis, New Ulm & Southwestern Railroad Companies, had failed to agree upon a division of the joint rate fixed by the order of the Commission, as shown by

Schedule "B;" and thereupon the Commission, by said order, proceeded to, and did, determine and order that earnings under said joint rate, so fixed by it, should be divided by paying to the St. Paul & Duluth Railroad Company *one dollar* per ton for transporting hard coal from Duluth to Minneapolis; the remainder to be paid to The Minneapolis & St. Louis Company, which was left to settle with The Minneapolis, New Ulm & Southwestern and The Wisconsin, Minnesota & Pacific companies; for services rendered by those companies in the transportation of coal to points upon their respective railroads. Neither of the two last named carriers are parties to this proceeding; and no attempt is made to reduce their regular local rates, for transportation, over their respective railroads.

It should be noted here, that the amount allowed to the St. Paul & Duluth Company, was the same allowed that company, in a division of the voluntary joint rate made by the carriers themselves,—one dollar per ton; *and the whole amount of the reduction, made by the Commission, was assessed against The Minneapolis & St. Louis Railroad Company.*

The Minneapolis & St. Louis Railroad Company refused to accept the divisions made by the order of the Commission (which was duly promulgated), and refused to accept the joint tariff fixed by said order; and thereupon this proceeding was instituted in the name of the State of Minnesota, on relation of the said Railroad and Warehouse Commission. The case was tried in the District Court of Ramsey County on the issues presented by the Alternative Writ of Mandamus, and the Answer and Return made thereto by The Minneapolis & St. Louis Railroad Company, the appellant herein.

On February 15th, 1900, said District Court rendered judgment, that a peremptory writ of mandamus issue, as prayed; commanding the defendants to adopt the through joint rate fixed by the Commission, in Schedule "B," and dividing the moneys earned thereby, as directed by the order of the Commission made April 8, 1899; said order being Exhibit "C," on pages 20 and 21 of the printed Record. Said judgment is set out in full at pages 114 and 115 of the Record.

From the judgment so entered, The Minneapolis & St. Louis Railroad Company appealed to the Supreme Court of

Minnesota, by which court said judgment was, on June 29th, 1900, in all things affirmed. (Record, pages 132, 133.)

A Writ of Error was duly allowed by the Chief Justice of the Supreme Court of the State of Minnesota, upon the petition of The Minneapolis & St. Louis Railroad Company, and the case is now before this Court for hearing.

It is claimed by the plaintiff in error:

That the undisputed evidence shows, conclusively, that the tariff promulgated by the relator, and which the plaintiff in error is, by the judgment of the Supreme Court of Minnesota, required to accept and adopt, requires the plaintiff in error to render transportation service at less than the actual cost of such service; that such tariff is wholly inadequate and not compensatory; and, therefore, the act of the State in assuming to compel its adoption is violative of the Fourteenth Amendment, and also of Section Ten, Article One, of the Federal Constitution.

It is also claimed by the plaintiff in error, that the law, under and by virtue of which the State of Minnesota assumes to establish joint through rates or tariffs over the lines of independent connecting railroads, and by virtue of which it assumes to arbitrarily apportion and divide joint earnings, is violative of the Fourteenth Amendment to the Federal Constitution, and void.

The plaintiff in error claims the right to earn a reasonable profit upon its invested capital; and asserts that any profit which does not exceed the rate of interest which may be recovered, in the absence of a contract, is not *prima facie* excessive.

That the act of the State legislature, by which authority is conferred upon the Railroad and Warehouse Commission, to compel one carrier to use the cars of another carrier or to deliver its own cars to another carrier, is unconstitutional and void.

That the State has no power to compel a carrier to transport traffic originating at certain points, or upon the road of certain carriers designated by the State, at a less rate

than it may lawfully collect, *for the same service*, if the traffic originates elsewhere. In other words, the State cannot compel carriers to discriminate.

The questions involved are more precisely stated in the Assignment of Errors. There is no conflict in the *evidence*. The only conflict lies in the *conclusions*, stated by some of the witnesses.

ASSIGNMENT OF ERRORS.

The plaintiff in error respectfully submits that the Supreme Court of Minnesota erred in this:

1. In holding and deciding that the order of the Railroad and Warehouse Commission, by which it required this plaintiff in error to transport hard coal, in car loads, from Minneapolis to the several stations named in said order, for a compensation, and at a rate less than the cost and true value of the services rendered, is not violative of the Fourteenth Amendment to the Constitution of the United States; which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. In holding that the order of the Railroad and Warehouse Commission, by which this appellant is required to transport hard coal, in car loads, at a rate and price per ton fixed by said order, which rate or price is less than the actual cost and expense incurred by plaintiff in error in rendering said service, and is unjust, inadequate and not compensatory, is not violative of Section 10 of Article 1 of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts.

3. In holding that the law enacted by the legislature of the State of Minnesota, embodied in Chapter 91 of the General Laws of 1895, by which the Railroad and Warehouse Commission of said State is authorized to compel two or more railroad companies to enter into a joint tariff; and make and adopt a joint rate, for the transportation of property over the lines of said companies; and which assumes to authorize said Commission to make a division of the joint earnings of two or more railroad companies, and to apportion such earnings, is not violative of the Fourteenth Amendment to the Constitution of the United States in this:

It denies to the plaintiff in error, the right to contract in reference to its own business; and thus takes its property without its consent.

It compels the plaintiff in error to enter into involuntary, unreasonable and unprofitable contracts with other carriers,

at the instance of third parties; resulting in a loss of business and revenue on the part of the plaintiff in error.

It requires the plaintiff in error to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires the plaintiff in error to hire, and use, the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives the plaintiff in error of the right to make its own contracts with other carriers; and delegates to a non-judicial body the right to fix and determine the proportion of a joint through rate, which shall be paid to the plaintiff in error; thereby depriving the plaintiff in error of its property,—the right to use the same, and the right to contract in relation thereto.

It denies to the plaintiff in error the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property; and deprives the plaintiff in error of its property without due process of law.

It abridges the privileges and immunites of the plaintiff in error as a citizen of the United States, by depriving it of the right to control, conduct and manage its own business.

4. In holding that the law of the State of Minnesota, by which it is held that in estimating, and computing, the cost of operating a railway per ton of freight, per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration any part of the earnings applied to the payment of dividends upon the capital stock of such railway, does not violate the Fourteenth Amendment of the Constitution of the United States in this:

The enforcement of such law deprives the company or corporation operating such railway of the right to earn or pay any dividend whatever on its capital stock; or to derive any income or return from the use and operation of its property; and enables the State, acting through the Railroad and Warehouse Commission, to make and enforce a tariff which will not permit the carrier to earn any sum in excess of actual cost of operation; and will compel such carrier to devote its property to the public use without compensation;

whereby it is deprived of its property without due process of law, and is denied the equal protection of the laws.

5. In holding that the State law, which, under the guise of a so-called "commercial necessity," assumes to compel railway carriers to transport freight over their lines of railway for a rate less than the actual cost of such service, does not violate the Fourteenth Amendment to the Federal Constitution, by depriving such carriers of their property without due process of law, and by denying the equal protection of the laws, which insure to all citizens the right to earn and receive a reasonable compensation for service rendered, and a reasonable profit over and above the actual reasonable cost of such service.

6. In holding that the law of the State of Minnesota, which authorizes all other citizens of said State to contract for, collect and receive a profit or dividend equal to six per cent. upon the capital invested, and denies to railway carriers the right to earn, collect and receive a dividend or interest charge not exceeding six per cent. upon its actual and necessary capitalization, does not violate the Fourteenth Amendment to the Constitution of the United States, by depriving such railway carriers of their property without due process of law, and by denying them the equal protection of the laws.

7. In holding that the State of Minnesota, acting through the Railroad and Warehouse Commission, has the right, power and authority to compel the plaintiff in error to enter into a joint rate, or make and perform an agreement with another carrier for the transportation of property over the lines of both companies.

8. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, by which two or more connecting carriers may be compelled to transport shipments passing over two or more lines, for a less or different rate or tariff than the sum of the reasonable local rates or tariffs of the several carriers.

9. In holding that the State of Minnesota has the right, power or authority to make and enforce a law which declares and determines the manner and proportion in which money, earned by two or more carriers, in transporting mer-

chandise over two or more connecting lines, shall be divided between the several carriers.

10. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad, designated by the Railroad and Warehouse Commission, at a different and less rate than it may lawfully collect and receive for the same service, where the traffic originates upon its own line; thereby forcing defendant to give a preference and discriminate in favor of certain traffic and certain localities.

11. In holding that the State of Minnesota has the right, power or authority to make and enforce a law whereby a railroad carrier may be compelled to charge and collect different rates, per ton, per mile, for traffic originating upon other railroads, from that collected for traffic local to its own railroad; notwithstanding the service rendered is identical.

12. In holding that the evidence does not show conclusively that the cost of the service required by the State, through the Railroad and Warehouse Commission, is not greater than the revenue to be derived from the proportion of the joint rate awarded to the plaintiff in error.

13. In holding that, in order to show that the rate fixed by the Railroad and Warehouse Commission is unreasonable, the plaintiff in error is bound to show the exact cost of transporting each particular commodity, and that such fact is not established by proof that the cost, per ton, per mile of transporting all merchandise is more than the rate per ton, per mile, fixed by the order of the Commission.

14. In holding that there was not competent and sufficient evidence of the capitalization, cost and value of the railroad of the plaintiff in error.

ARGUMENT.

I.

The first, and second, Assignments, allege error by the Supreme Court of Minnesota:

1. In holding, and deciding, that the order of the Railroad and Warehouse Commission, by which it required this plaintiff in error to transport hard coal in car loads, from Minneapolis, to the several stations named in said order, for a compensation, and at a rate less than the cost and true value of the services rendered, is not violative of the Fourteenth Amendment to the Constitution of the United States; which provides that no State shall deprive any person of property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

2. In holding that the order of the Railroad and Warehouse Commission, by which this appellant is required to transport hard coal, in car loads, at a rate, and price, per ton fixed by said order, which rate, or price, is less than the actual cost and expense incurred by plaintiff in error in rendering said service, and is unjust, inadequate, and not compensatory, is not violative of Section 10 of Article 1 of the Constitution of the United States; which declares that no State shall pass any law impairing the obligation of contracts.

The law is, seemingly, settled, that a carrier is entitled to charge and collect a tariff which will afford a reasonable compensation; the question as to what constitutes reasonable compensation, within this rule, is also fairly well settled. A law which assumes to establish and enforce a tariff which fails to afford and return such reasonable compensation violates the Federal Constitution.

Railway Company vs. Minnesota, 134 United States, 418, 459.

Reagan vs. Farmers Loan & Trust Co., 154 United States, 362, 399.

St. Louis & San Francisco Railway Company vs. Gill, 156 United States, 649.

Smythe vs. Ames, 169 United States, 466, 526.

Lake Shore & Michigan Southern Railway Company vs. Smith, 173 United States, 687.

Upon the question of fact, as to whether the rate established by the State Railroad and Warehouse Commission affords a reasonable compensation for the service rendered, there is no conflict of evidence. The undisputed evidence shows conclusively that the actual cost of transportation exceeds the revenue which would result from a compliance with the order of the commission.

The following table is a combination of Schedules "A" and "B," referred to, and incorporated in the alternative writ, with some additional information. The rates, per ton, fixed by the joint rate voluntarily entered into by the carriers, is shown in the column headed "Old Rate;" the rate fixed by the order of the Commission is shown in the column headed "New Rate." The third column shows the distance of each station from Minneapolis, in miles and tenths; and the last column gives the name of the railroad upon which the station is located. The Minneapolis & St. Louis is marked "St. L.," The Minneapolis, New Ulm & Southwestern "N. U.," and The Wisconsin, Minnesota & Pacific "Wis." The rate shown is, in each case, the rate, per ton, from Duluth to the station named:

Stations.	Old Rate.	New Rate.	Distance from Minneapolis.	R. R.
Hopkins	$1.75	$1.32	8.7 miles.	St. L.
Minnetonka	2.00	1.35	11.7 "	"
Deephaven	2.00	1.38	15.8 "	"
Excelsior	2.10	1.40	18.8 "	"
Waconia	2.35	1.51	31.5 "	"
Young America	2.45	1.56	39.1 "	"
Norwood	2.50	1.57	40.3 "	"
Hamburg	2.50	1.62	43.8 "	"
Green Isle	2.50	1.63	48.1 "	"
Arlington	2.50	1.68	54.3 "	"
Gaylord	2.50	1.75	62.3 "	"
Winthrop	2.50	1.80	69.3 "	"
Lafayette	2.50	1.86	76.1 "	N. U.
Klossner	2.50	1.91	82.1 "	"
New Ulm	2.50	1.95	88.0 "	"
Gibbon	2.50	1.87	77.4 "	St. L.
Fairfax	2.50	1.96	86.9 "	"
Franklin	2.50	2.01	94.9 "	"
Morton	2.50	2.05	100.4 "	Wis.
Redwood	2.50	2.11	106.8 "	"
Delhi	2.50	2.15	113.3 "	"
Belview	2.50	2.21	119.9 "	"
Echo	2.50	2.23	123.4 "	"
Wood Lake	2.50	2.29	129.7 "	"
Hanley Falls	2.50	2.33	134.8 "	"
Hazel Run	2.50	2.38	141.0 "	"
Clarkfield	2.50	2.42	146.2 "	"
Boyd	2.50	2.48	152.6 "	"

In taking up the discussion of the question as to whether or not the tariff fixed by the Commission is or is not compensatory, it is important to start in with a fair and definite understanding of two questions: *first*, what is meant by a "compensatory rate;" and, *second*, the method by which the reasonableness of a rate is to be determined. Fortunately, both of these important questions have been definitely settled by the decisions of the Federal Courts.

II.

A rate which is not productive of revenue sufficient to pay operating expenses, interest upon bonds and a reasonable dividend upon stock, is unreasonably low; and cannot be enforced.

It was at one time contended that the fixing of rates, for carriage, by a public carrier, was a matter wholly within the power of the legislative department of the State governments and beyond examination by the courts; and that in fixing such rates, neither the interest charges which railroad companies are obliged to pay upon outstanding bonds, nor the claim of the right of the stockholders to reasonable dividends were entitled to consideration. Two of the three contentions, were definitely adjudicated in favor of the carriers, in the case of *Reagan vs. Farmers Loan & Trust Company, 154 United States, 362.* This case was an important one; it being held therein, that a Railroad and Warehouse Commission is merely an administrative board created by the State, for carrying into effect the will of the State, as expressed by its legislation; that the equal protection of the laws guaranteed by the Fourteenth Amendment, forbids legislation, in any form, by which the property of one person is, without compensation, taken for the benefit of another, or of the public; that the action of the State, through its legislature and the Commission, fixing railroad rates, is the subject of judicial review; *and that in fixing such rates the payment of the "fixed charges," or interest upon the outstanding bonded indebtedness of the railroad, must be included as a part of the necessary expense of operating the railroad.*

The question of the right to earn dividends had not, at

that time, been directly presented to the Federal Courts; and MR. JUSTICE BREWER, in the opinion at page 393, says:

"Whether, in the absence of an express stipulation of that character, there is not implied in the grant of the right to construct and operate, the grant of a right to charge and collect such tolls as will enable the company to successfully operate the road and return some profit to those who have invested their money in the construction, *is a question not yet determined.*"

This quotation from the opinion in the Reagan case, written in 1894, is important, by reason of the fact, that in 1888, the learned writer thereof, while circuit judge, wrote the opinion in *Railway vs. Dey, 35 Federal Reporter, 866,* from which opinion the following language is quoted:

"Compensation implies three things: Payment of cost of service, *interest on bonds, and then some dividends.* Cost of service implies skilled labor, the best appliances, keeping of the roadbed and the cars and machinery and other appliances in perfect order and repair. The obligation of the carrier to the passenger and the shipper requires all these. They are not matters which the carriers can dispense with, or matters whose cost can by them be fixed. They may not employ poor engineers, whose wages would be low, but must employ competent engineers, and pay the price needed to obtain them. The same rule obtains as to engines, machinery, roadbed, etc., and it may be doubted whether even the legislature, with all its power, is competent to relieve railroad companies, whose means of transportation are attended with so much danger, from the full performance of this obligation to the public. *The fixed charges are the interest on the bonds. This must be paid, for otherwise foreclosure would follow, and the interest of the mortgagor swept out of existence. The property of the stockholders cannot be destroyed any more than the property of the bondholders. Each has a fixed and a vested interest, which cannot be taken away.* I know that often the stockholder and the bondholder are regarded and spoken of as having but a single interest; but the law recognizes a clear distinction. A mortgage on a railroad creates the same rights in mortgagor and mortgagee as a mortgage on my homestead. The legislature cannot destroy my property in my homestead simply because it is mortgaged, *neither can it destroy the stockholders' property because the railroad is mortgaged. It cannot interfere with a contract*

between the company mortgagor and the mortgagee, or reduce the stipulated rate of interest; and so, unless that stipulated interest is paid, foreclosure of course follows, and the mortgagor's rights, the property of the stockholders, are swept away. Whatever individuals may do by private contract to modify existing rates of interest, the legislature has no compulsory power in the matter. While, by reducing the rates, the value of the stockholders' property may be reduced, in that less dividends are possible,—and that power of the legislature over property is conceded,—*yet, if the rates are so reduced that no dividends are possible,* and especially if they are such that the interest on the mortgage debt is not earned, *then the enforcement of the rate means either confiscation, or compelling, in the language of the Supreme Court, the corporation to carry persons or property without reward."*

This case is frequently referred to as supporting the claim that a rate is reasonable if it produces *any* revenue, much or little. It is true that the opinion has been so construed, but such construction was retracted in the Ames Case; and the same learned Judge says, in his opinion in the Reagan Case, written six years later, that the question is still undetermined. The question was subsequently met and decided by McKENNA, Circuit Judge, in the case of *Southern Pacific Company vs. Board of Railroad Commissioners, 78 Federal Reporter, 236,* a case decided November 30th, 1896. The holding was as follows:

"Rates are unreasonable which will not return a sum sufficient to pay operating expenses, interest upon bonds, and a *reasonable* dividend upon stock, where bonds and stock represent money invested in the property, and there has been no fraud or mismanagement in the construction or operation. A railroad company is entitled to a sum sufficient not only to pay its expenses, but to yield an *adequate* return on the investment."

In commenting upon the claim that a rate which returns *any* compensation to the stockholder is a reasonable rate (78 Fed. Rep., 261), the Court says:

"This is claimed to be established by authority. I do not think so. It seems to have been decided in the Dey Case, 35 Federal, 866. *But the same learned judge who ex-*

pressed that view in the Dey Case retracted it in the Ames Case, 64 Federal, 155, and it has received no judicial sanction since. This was inevitable when it came to be seen that the regulation of rates could not be an absolute legislative prerogative. When the power of judicial review was asserted and entertained, the Fourteenth Amendment of the Constitution was bound to be firmly and accurately applied. There could be no middle ground. Middle ground would satisfy neither legislative prerogative nor judicial prerogative. Certainly not the judicial prerogative. That must apply justice as it is understood by men, and, in its clear light, it was inevitable that it would come to be seen that the Fourteenth Amendment of the Constitution would be a composition of delusive words if it forbade only the taking of the physical property, while it permitted the taking of its value,—if its guaranties of the law's equal protection to all persons would be satisfied as to railroads by leaving them a microscopical profit. If so, the pool of Tantalus would lose its force to illustrate excited and disappointed expectations when compared with the organic law of this great land. We should keep in mind that the regulation of a railroad affects, in reality, the natural persons who own it, not the insensible, legal artificiality and abstraction called a corporation. For the natural persons the protection of the Constitution was intended, and would any one say that justice is done them, if their investment be allowed only an infinitesimal fraction of one per cent. while all other investments are expected to return, at least legal interest, with freedom, besides an unlimited advantage?"

I respectfully submit, that a reasonable rate for the transportation of goods by common carriers, is a rate which will permit the carrier to earn, and pay, its operating expenses, its fixed charges and a reasonable dividend upon its capital stock.

III.

The reasonableness of a schedule of rates for local business of a railroad company, is to be determined by a comparison between the gross receipts and the cost of doing the business. It must be determined without reference to interstate business, or profits derived therefrom.

The rule as above stated is the one announced by the

Supreme Court of the United States in *Chicago, Milwaukee & St. Paul Railway vs. Tompkins, 176 United States, 167.*

The opinion is written by MR. JUSTICE BREWER. The case holds that the question of reasonableness of the *local* rate must be determined by a comparison between the gross earnings from local business, and cost of transacting such local business; and failure to adopt that rule was held to be reversible error. It is also held, that it is proper to show that the cost of transacting local business is in excess of the cost of transacting through business; and that such testimony may not be disregarded simply because the exact difference in such expense cannot be mathematically demonstrated.

In *Smyth vs. Ames, 169 United States, 467, 541,* it is decided that the reasonableness or unreasonableness of rates, prescribed by a State, for the transportation of persons and property wholly within its limits, must be determined without reference to the interstate business done by the carrier, or to the profits derived from that business. The court says, at pages 541-542, that the argument that a railroad line is an entirety; that its income goes into, and its expenses are provided for, out of a common fund, and that its capitalization is on its entire line, within and without the State, can have no application where the State is without authority over the entire line, and can only deal with local rates and make such regulations as are necessary to give just compensation on local business.

In the case of *Ames vs. Union Pacific Railway Company, 64 Federal Reporter, 179,* MR. JUSTICE BREWER, at Circuit, says:

"There are certain matters which embarrass these cases, and render all computations more than ordinarily difficult. One is this: The various companies are doing an interstate as well as a local business. If these roads were wholly within the State and only local business done by them, the computation would be much simplified, and the effect of the reduction of the rates upon the property more easily disclosed. But all of these roads are interstate roads and a large portion of their business is interstate business. Some of it is local business in other States than Nebraska. Now, it will not do to look simply at the gross earnings, and, because the reduction therein made by the enforcement of this statute still

leaves enough to pay reasonable compensation to the owners of the property, uphold the act, because, if the legislature of Nebraska can put in force this tariff for local business, the legislatures of other States through which these roads run, and the Congress of the United States may make corresponding reductions on the rates on all other business, local and interstate, and the aggregate of such reductions might entirely destroy the earning capacity from the property.

Another matter to be noticed is this: There is in this act no interference with the passenger traffic, but only the maximum for freight rates. So we cannot place all the local expense over against all the local receipts and draw our conclusions therefrom. We have an attempt by the legislature to prescribe the maximum tariff for only the transportation of freight within the limits of Nebraska, and are called upon to determine whether the rates so fixed are unreasonable and afford no fair compensation to those who have invested their means in these railroad properties. In order to determine this we must ascertain what it cost to carry this local freight, what the receipts have been therefrom, and what reduction will be made in such receipts by the application of this act, and then we must take such proportion of the gross investments in the road as the present earnings from local freights bear to the total earnings of the road. From these computations we may see whether the reduction made by this act in the local freights, if applied to all the company's business, would leave any compensation to the owner, and if so, how much."

IV.

In determining whether a rate is reasonable, the value of the property employed must be considered.

In *Smyth vs. Ames, 169 United States, 546*, it is held that the basis of all calculation as to the reasonableness of rates, to be charged by a railroad company, must be the fair value of the property used by it for the convenience of the public. A railroad company is entitled to receive a fair return upon the value of that which it employs for the public convenience.

"And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under

particular rates prescribed by statute, and the sum required to meet operating expenses, are all matters for consideration and are to be given such weight as may be just and right in each case."

In the case at bar, the amount of stock and bonds of the appellant, was proven; also the cost of construction. No other evidence of the value of the property was offered by either party. One, or the other, of these should be accepted as the value of the property; that is to say, either the total capitalization (the sum of the stock and outstanding bonds), or the cost of construction, as shown by the construction account, represents the fair value of the property. This is the rule laid down in the case of *Ames vs. Union Pacific Railway Company* (*supra*), *64 Federal Reporter, 177, in which the Court says:*

"It is not easy to always determine the value of railroad property, and if there is no other testimony in respect thereto than the amount of stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other of these represents it; and computation as to the compensatory quality of rates may be based on such amounts. * * * Nevertheless, the amount of money that has gone into the railroad property, the actual investments as expressed, theoretically, at least, by the amount of the stock and bonds—is not to be ignored, even though such sum is far in excess of the present value."

It is made clear by reading the above decisions that the reasonableness of a schedule of rates for the local business of a railroad company must be determined by comparison between the gross receipts from *local business*, and the cost of doing such *local business*; that the question must be determined without reference to interstate business done or to profit derived from it; that under the rule that the rate, in order to be reasonable, must be sufficient to return a fair rate of interest or dividend upon the value of the property employed for the public convenience, the Court, in the absence of other evidence, should accept, either the cost of construction or the capitalization as evidenced by the stock and outstanding bonds, as the basis of value. With these points

fairly stated, and settled, we can now proceed to an intelligent consideration of the evidence in this case.

V.

The order of the Railroad and Warehouse Commission is not made applicable to all freight transported over all or any of the appellant's lines or divisions in the State of Minnesota, but is limited to the transportation of a *single commodity, between certain specified points.* It includes, only, hard coal in car loads shipped from Duluth to Minneapolis, via the St. Paul & Duluth Railroad, and delivered to the appellant at Minneapolis for transportation over its own line and that of the connecting carriers, to the several stations named in the order and listed in Schedule "B." It does not include passenger earnings. The rate per ton fixed by the Commission as compensation for the service rendered by the appellant and its connecting lines, is obtained by deducting one dollar from the through joint rate, as fixed by the order; the one dollar being the proportion of such rate awarded to the St. Paul & Duluth Company.

Mr. Frank Nay, the auditor of the Minneapolis & St. Louis Railroad Company, testified as to the capitalization, and cost of construction, earnings and expenses of the appellant company; his testimony being found at page 45 of the printed Record and succeeding pages.

The value of the entire property is as follows:

Bonded Debt.

Merriam Junction & Albert Lea; amount outstanding	$ 950,000
Iowa Extension; amount outstanding	1,015,000
Pacific Extension; amount outstanding	1,382,000
First Consolidated; amount outstanding	5,282,000
First & Refunding; amount outstanding	7,800,000
Minneapolis & Duluth	280,000
Minneapolis & Merriam Junction	455,000
Southwestern Extension	636,000
Total	$17,800,000
Capital Stock	$10,000,000
Total Capitalization	$27,800,000

Of this there had been actually expended in purchase and construction up to June 30, 1899, the end of that fiscal year, $23,390,560 (Record, page 46).

Under the rule laid down by the Supreme Court of the United States, in the *Ames Case, 64 Fed. Rep., 177,* it must be conceded that in the absence of other evidence, either the capitalization, or the construction account, should be assumed to be the fair value of the property, as a basis for determining whether the rate is compensatory; and we concede that the smaller sum, viz., the cost as shown by the construction account, should be adopted. This fixes the value of the property at $23,390,560.

The income and expenditures for the fiscal year were as follows *(Record, page 46):*

RECEIPTS.

Gross earnings of the whole system	$2,500,004,36
Interest from investments	25,952.41
Interest and exchange	18,936.19
Trackage and rentals	151,708.35
Total receipts from all sources	$2,696,601.31

EXPENDITURES.

Operating expenses	$1,438,004.84
Taxes	84,700.25
Interest on bonded debt	659,540.00
Trackage and other rentals	55,694.18
Total expenditures	$2,237,939.27
TOTAL RECEIPTS	$2,696,601.31
TOTAL EXPENDITURES	$2,237,939.27
NET EARNINGS	$458,662.04

It will be seen from the foregoing tables that *the whole net earnings* equal but four and one-half per cent. of the capital stock; which, in view of the fact that the legal rate of interest in Minnesota in absence of contract is six per cent., would not be an unreasonable dividend could the whole sum

be thus applied. This, of course, is wholly impracticable. From net earnings there must be paid so many items of expense, that only a part of the net earnings can be devoted to the payment of dividends. For instance, the deterioration of equipment, notwithstanding all repairs and renewals, is fixed by the Master Car Builders' Association at six per cent. per annum, and this item alone absorbs $120,000 of our net earnings. This statement is made as an illustration only, but the evidence shows that the expenditures show no provision for purchase or renewal of equipment, purchase of additional property, construction, improvements, betterments, or anything except actual present expenses.

The dividends actually paid amount to $294,583.33, *and were paid from the $458,662.04, net earnings*, that is to say, the $458,662.04 represents the net earnings; *before any dividends were paid*, and all dividends actually paid were paid from that sum.

The original stock capitalization of the appellant, at the reorganization in 1894, was as follows:

First Preferred stock	$2,500,000
Second Preferred stock	4,000,000
Common stock	6,000,000
Total	$12,500,000

The first preferred stock was retired June 1st, 1899, by payment of the principal and a dividend at 5 per cent., in accordance with the conditions of the certificates. It was paid by a bond issue at 4 per cent., *so that the interest has become a fixed charge, and must be paid. (Record, page 69.)*

The dividend paid for the fiscal year up to the time of the retirement of this stock was, for eleven months, at the rate of 5 per cent.	$114,583.33
Dividend on $4,000,000 second preferred, at 4½ per cent.	180,000.00
Total dividends	$294,583.33

No dividend has ever been paid on the common stock. *See page 69, printed Record.*

It will be noted that the actual dividends paid amount to less than three per cent. upon the capital stock; also that $114,583.33 of this sum paid was substantially converted into a fixed interest charge, and is but technically a dividend. The real dividend was but $180,000,—less than two per cent. on the capital stock.

This statement of the value of the property, *as a whole;* its gross earnings and expenses, *as an entirety;* and the dividend account, is of little immediate importance in the determination of the principal question in this case, as the reasonableness of local rates must be determined by a comparison of the earnings possible under the rate fixed by the commission, with the cost of doing the business; and must be determined without reference to the interstate business, or the profit derived from it. It will be seen, however, as the argument progresses, that the statement is, indirectly, of considerable importance in establishing the fact, that, in ascertaining the actual cost of transportation of the traffic involved in this proceeding, the estimates have been made upon the precise lines prescribed by the Federal Courts.

VI.

The undisputed evidence shows conclusively that the earnings which will result from the rate fixed by the Railroad and Warehouse Commission, will return or yield no adequate compensation for the service rendered; that the actual cost of transportation is in excess of such earnings; and that an enforcement of the tariff will subject the appellant to actual loss.

The correctness of this proposition will be demonstrated in more than one way. That it is unjust, discriminative and unfair; violative of all precedent, custom and methods in railway rate making and regulation, will be shown by comparison and illustration; and that it is noncompensatory, inadequate and confiscatory, will be shown by mathematical demonstration.

The local rate of the St. Paul & Duluth Railroad Company, one of the defendants in this proceeding, for transporting hard coal in car loads from Duluth to Minneapolis, was and is, as shown by the record, one dollar and twenty-five cents

per ton. The mileage adopted by the commission as a basis for fixing rates, is 156 miles. This rate and mileage is shown upon the map, made for that purpose by MR. YAPP, the Relator's statistician, and used in evidence in this case *(see map at page 116, printed Record);* also by the testimony of Hon. IRA L. MILLS, Chairman of the Commission. *(Record, page 76.)* The rate per ton, per mile, from Duluth to Minneapolis, is 8 mills—eight-tenths of one cent. This rate per ton, per mile, the local rate of the St. Paul & Duluth Company, from Duluth to Minneapolis, was adopted by the commission as the basis of the joint through rate, *and was extended* from Minneapolis to all the stations named in Schedules "A" and "B." That is to say, the commission fixed the compensation to be paid to the Minneapolis & St. Louis Company, The Wisconsin, Minnesota & Pacific Company and The Minneapolis, New Ulm & Southwestern Company, for transporting hard coal, in car loads, from Minneapolis to the various points named in those schedules, at *eight mills per ton per mile. See testimony of Ira L. Mills, pages 76-77, and testimony of W. M. Hopkins, page 77, printed Record.*

Now let us compare the conditions:

The St. Paul & Duluth Company transports very nearly *half a million tons,* annually, between Duluth and the Twin Cities; the rate to St. Paul and Minneapolis being the same. This is nearly fifteen hundred tons daily, Sundays included. This is the testimony of its General Freight Agent. See printed Record, page 43. As this is *through business* from Duluth to the Twin Cities, it means a continuous run of 156 miles; with solid trains; no stops for local work or switching. It means, in brief, the ideal method of handling traffic, in a continuous run, at a minimum cost.

The Minneapolis & St. Louis, The Wisconsin, Minnesota & Pacific and The Minneapolis, New Ulm & Southwestern companies handled, *during the same period,* between Minneapolis and the stations named in the order of the commission, the following shipments of hard coal:

Hard coal handled by the Minneapolis & St. Louis; The Wisconsin, Minnesota & Pacific, and the Minneapolis, New Ulm & Southwestern companies, between Minneapolis and the stations named in Schedules "A" and "B," during the fiscal year:

Stations.	Tons.	R. R.	Distance from Minneapolis.
Hopkins . . . . . none	.....	.....	.....
Minnetonka . . . . . none	.....	.....	.....
Deephaven . . . . . none	.....	.....	.....
Excelsior . . . . . none	.....	.....	.....
Waconia . . . . . none	.....	.....	.....
Young America . . . . none	.....	.....	.....
Norwood	34	St. L.	40
Hamburg . . . . . none	.....	.....	.....
Green Isle . . . . . none	.....	.....	.....
Arlington	74½	St. L.	54
Gaylord.	30	"	62
Winthrop	143	"	69
Lafayette	39	N. U.	76
Klossner . . . . . none	.....	.....	.....
New Ulm	526½	N. U.	88
Gibbon	115	St. L.	77
Fairfax	340	"	87
Franklin	160	"	95
Morton	270	"	100
Redwood	143	Wis.	107
Delhi . . . . . none	.....	.....	.....
Belview	44½	Wis.	120
Echo.	195	"	123
Wood Lake.	42½	"	130
Hanley Falls . . . . . none	.....	.....	.....
Hazel Run	75	Wis.	141
Clarkfield.	169	"	146
Boyd.	12	"	153
Total	2413		1668

Average distance.....98 miles.

See testimony of General Freight Agent, W. M. Hopkins, page 70, of the printed Record.

Here we have a total of but *two thousand four hundred and thirteen tons;* distributed to *seventeen stations,* at an average distance from Minneapolis of 98 miles; these seventeen stations, situated on three different railroads; each car being taken from one train, and put into another, three—possibly four times. (See printed Record, pages 71-72.)

A reasonable switching charge for each car, at each point of transfer, is two dollars per car; which gives no profit and barely covers the cost of the work (Record, page 72). This is uncontradicted.

It is manifestly unfair to extend the local rate of the St. Paul & Duluth Company, for hauling a half million tons of hard coal, annually, in solid trains, doing no local work and making no transfers; starting at Duluth and stopping at the Twin Cities after a continuous run of 156 miles,—to the small traffic divided among three railroad companies, destined to seventeen stations, transferred at three junctional points, at an average distance of ninety-eight miles from Minneapolis.

VI.

The rate per ton, per mile, fixed by the order of the commission is unjust and discriminative, as compared with the reasonable rates charged, and collected, by other carriers for the same service.

The following table, made up from the uncontradicted testimony of General Freight Agent, W. M. Hopkins, shows some hard coal tariffs on other Minnesota lines; all shipments originating at Duluth (Record, pages 77, 78, 79):

Station.	Miles from Duluth.	Rate per ton.	Rate per ton per mile.
Fergus Falls.....	217	$2.45	1.129 cts.
Breckenridge.....	242	2.75	1.136 "
Appleton.....	250	2.50	1. "
Cottonwood.....	248	2.50	1.008 "
Morris.....	227	2.40	1.057 "

The through rate, from Duluth to New Ulm, under the tariff in force prior to the making of the order of the commission, was $2.50 per ton; the distance being in round numbers, 250 miles; in exact figures, 244 miles. This $2.50 rate was, of necessity, extended as far west as Madison, a distance of 331 miles from Duluth, in order to meet the rate made by the Great Northern Railway, from Duluth to Appleton, a station opposite Madison; the Great Northern having the short line. (Record, page 78.)

The rate from Duluth to Brownton, Stewart and points on the Chicago, Milwaukee & St. Paul Railroad, opposite Winthrop and Gibbon, on the line of the plaintiff in error, is $2.50 per ton. The rate to Bird Island and points on the "Milwaukee,' opposite Morton, is $2.50 per ton; to Renville and points opposite Delhi or Echo, $2.50 per ton; to Montevideo, opposite Clarkfield, $2.50 per ton.

The average reduction made by the order of the commission is 53 cents per ton. (*See testimony of W. M. Hopkins, Record, page 78.*)

The commission fixed the proportion of the joint rate established by its order, to be paid to The St. Paul & Duluth Company, at $1.00 per ton; the same company voluntarily accepts *85 cents* per ton for hard coal destined to points on the line of the plaintiff in error, south of Albert Lea (Record, page 84); and *ninety cents* per ton for coal destined to Waseca (Record, page 84), *the service rendered by the "Duluth" Company being in each case identical*, viz.: transportation from Duluth to Minneapolis. These facts are testified to and explained fully by General Freight Agent, Mr. W. M. Hopkins, and are not controverted. The effect of the order of the commission is to reduce the tariff on appellant's road, on an average of 53 cents per ton below the rates of other carriers for the same service; and this, upon business for which the original charge did not exceed $1.50 per ton.

It is not necessary, however, to rest our case upon comparisons. The *actual cost* of rendering the service required in the transportation is greater than the revenue yielded by the tariff fixed by the commission. The computations showing

the cost of transportation were made by MR. FRANK NAY, plaintiff in error's Auditor, who, in making them, adopted the rule prescribed by MR. JUSTICE BREWER, in the *Ames Case, 64 Fed. Rep., 179*, quoted at page 18 of this brief.

MR. THOMAS YAPP, the statistician for the commission, accepted the figures; says they are correct; *adopted them*, and was only enabled to reach a different result *by arbitrarily deducting from our statement of expenditures, the amount paid as interest on bonds, and the comparatively small amount paid as dividends*, both of which items should be considered and included in the statement of expenditures.

All shipments of hard coal from Duluth to points designated in the order of the commission, are delivered to the appellant at Minneapolis. They, first, go to Hopkins; which, although nominally a station, and included in the tariffs, is in fact within the Minneapolis terminals; all shipments thereto being handled on a "switching charge." The "Western Division" extends from Hopkins westerly to Morton. (Record, page 50.) The "Pacific Division" extends from Morton to Watertown, South Dakota; and was, at all the times referred to in this proceeding, owned and operated by the Wisconsin, Minnesota & Pacific Railroad Company (Record, page 51); and the Minneapolis, New Ulm & Southwestern Division, extended from Winthrop to New Ulm (Record, page 52). All the hard coal traffic in controversy passed over these three divisions: from Hopkins west.

It is undisputed, that the cost per ton, per mile, of handling traffic over these three divisions is correctly estimated by Mr. Nay. No criticism of his method is made. It is the same method adopted by the plaintiff. It is the method prescribed by Judge Brewer as stated above. Now let us look at the results:

WESTERN DIVISION.

(Minneapolis & St. Louis.)

The average cost of operation, per ton, per mile, during the fiscal year, upon the Western Division (Hopkins to Morton), was 1.293 cents; the rate per ton per mile fixed by the commission is .779 cents; *the net loss per ton per mile is .514 cents—more than half a cent. Record, page 50.*

Minneapolis, New Ulm & Southwestern Division.
(M., N. U. & S. W. Railroad.)

The average cost of operation per ton, per mile, during the fiscal year upon this division (Winthrop to New Ulm) was 3.962 cents. On account of the short haul and high cost of operation, the New Ulm Company was allowed, arbitrarily, 30 per cent. of the revenue from traffic passing over its line (Record, page 48). This allowance would increase its revenue to 2.103 cents per ton per mile, but the expense of operaton would still exceed the revenue, under the commission rates, to the amount of 1.859 cents per ton per mile. But for the "arbitrary" the loss per ton per mile would be *nearly three cents. See Record, pages 50 and 51.*

The railroad constituting this division did not earn operating expenses, under the old tariff, notwithstanding it received an "arbitrary" of 30 per cent., the net loss for the fiscal year being $8,000. (Record, pages 48, 49.) The length of the road was but 20 miles; and prior to March 1st, 1899, it was an independent corporation. (Record, page 47.)

The Pacific Division.
(Wis., Minn. & Pac. R. Co.)

What is *now* known as the Pacific Division of the appellant was, until February 20, 1899, an independent railroad property, owned and operated by the Wisconsin, Minnesota & Pacific Railroad Company. It extended from Morton, Minnesota, to Watertown, South Dakota. (Record, page 51.) Of the stations named in the order of the commission, nine are located upon this line of road, viz: Redwood, Delhi, Belview, Echo, Wood Lake, Hanley Falls, Hazel Run, Clarkfield and Boyd. The cost per ton per mile, for handling freight on the road, was 3.184 cents, or *1.966 cents more than the average rate fixed by the commission. See page 58, printed Record.*

The St. Paul Division.
(Minneapolis & St. Louis.)

This division consists of the leased line between St. Paul

and Minneapolis, includes expensive terminals, and the cost of operation is 5.840 cents per ton per mile (Record, page 58).

These divisions include all of the trackage over which these shipments pass; and the trackage over which any given shipment *may* pass, includes the whole of one or all of these divisions. In short, it is upon these divisions, exclusively, that the business covered by the order of the commission is transacted. In making the computations, each division has been credited with the share of the carriage on a mileage basis, except that the New Ulm and St. Paul Divisions have been credited, arbitrarily, with a percentage, which has been considered in making the computations. *See page 58, printed Record.*

It is made clear by the testimony that the *actual cost* of the contemplated service, is greatly in excess of the rate allowed by the commission.

The Auditor, also, made a computation of the cost, per ton per mile, of the transportation of freight on the entire system, including the main line, where the cost of operation is lowest (estimated per ton, per mile) and including, of course, interstate traffic, which cannot be considered in a decision of this question.

The average cost per ton per mile of carrying freight *on the entire system* is 1.112 per cent. (Record, page 66.) The average revenue per ton per mile afforded by the tariff fixed by the commission is 1.118 cents (Record, page 68).

The rate fixed by the commission consists, first, of a rate of 8 mills per ton per mile from Minneapolis to destination. This is obtained, as already shown, by extending the local St. Paul & Duluth rate of $1.25 per ton, between Duluth and Minneapolis, to the stations covered by the schedules. The division of the joint rate made by the commission gives the St. Paul & Duluth *one dollar per ton*, and the extra twenty-five cents per ton, included in its local rate, is added, as an arbitrary, to the rate fixed for the appellant, without regard to the mileage. In each case, the rate made for appellant is 8 mills, per ton, per mile, from Minneapolis, plus 25 cents. Mr. Nay, in his computations, has estimated actual earnings of each division, and actual expenses, giving each division credit for arbitraries received in apportioning earnings.

This raises the earnings of the New Ulm Division to 2.103 cents per ton per mile, a sum much in excess of its real earnings, *notwithstanding which, there still remains a net loss or deficit.* The *average* earnings per ton per mile, to all points named in the schedule, would be, under the rate made by the commission, 1.118 cents. This average rate is but .006 of a cent per ton per mile, more than the average cost of operation, on the whole system, including interstate business. The decision of this case must, however, rest upon the cost of doing the *local* business. Such is the rule laid down by the courts. Other divisions, and other traffic cannot be drawn upon in order to enable the State to compel the plaintiff in error to do work for less than cost. A law which requires it, violates the Fourteenth Amendment to the Federal Constitution in this:

While other persons are permitted to receive reasonable profits upon their invested capital, the plaintiff in error is deprived of that right; whereby it is denied the equal protection of the laws. Such an enactment or regulation is not due process of law.

Railway Company vs. Minnesota, 134 United States, 458;
Reagan vs. Farmers Loan & Trust Company, 154 United States, 399;
Smyth vs. Ames, 169 United States, 526;
Railway Company vs. Smith, 173 United States, 687.

It violates Section 10, Article I, of the Constitution of the United States, in this:

The plaintiff in error, by accepting its charter, entered into a contract with the State of Minnesota, by which it undertook to perform the duties and obligations of a railroad carrier, for the benefit of the public. In consideration of this undertaking, the State became bound to permit the carrier to charge, and receive, such reasonable rates for the service rendered, as to enable it to maintain and operate its railroad and return a reasonable compensation for the use of the capital invested in the enterprise. A law which prohibits such reasonable rate is a direct and specific violation of the contract.

VII.

AS TO THE METHOD AND CORRECTNESS OF THE COMPUTATIONS.

The rule laid down in the case of *Ames vs. Union Pacific Railway Company, 64 Fed. Rep., 179*, for determining whether the rate fixed by the commission is compensatory, as stated by MR. JUSTICE BREWER, is quoted on page 18 of this brief. A reference to the testimony of MR. NAY will satisfy the Court that this rule has been closely followed in making the computations in the case at bar; although they were made without knowledge of the decision. A full explanation of the method adopted will be found at pages 53 to 56; pages 60 and 61 and pages 65 to 67, of the printed Record. Its correctness and absolute fairness will be conceded. *It is conceded by the defendant in error.* The only witness offered by the plaintiff, as to the reasonableness of the rate, was the relator's statistician, MR. THOMAS YAPP, who introduced certain tables, or exhibits, showing the cost of operation to be less than as stated by Mr. Nay. This result was reached, however, by *adopting Mr. Nay's figures as correct*, and deducting therefrom the two items of "Interest on Bonds" and "Dividends." MR. YAPP so testifies, at page 106, of the printed Record, as follows:

"Q. In the net cost, have you included the interest paid upon the bonded indebtedness, or any dividends upon stock? A. No, sir.

Q. Those items have been omitted? Yes, sir.

Q. Now, have you accepted the items as given by Mr. Nay in his testimony at page *45 (Record, page 60), with the exception, that you have not included the items of interest and dividends? Was it your intention to accept them? *What I mean is, was that your idea, that you would accept the items, with the exception that you would omit interest and dividends?* A. Yes, sir.

Q. This is intended to be a statement made from the evidence of Mr. Nay? A. *Yes, sir, just eliminating those particular items.*

Q. Just eliminating those particular items and then estimating the cost on your basis? A. Yes, sir."

*This reference is to a page in a transcript used in the trial. The evidence referred to is found at page 60, of the Record.

MR. YAPP stated on the stand that the statement of operating expenses by "divisions" and the statement as a total, covering the whole line, did not agree; but this is explained by MR. NAY at pages 107 and 108 of the printed Record, and is wholly unimportant.

The State admits, therefore, that the computations made by Mr. Nay are correct; and it is consequently proved, beyond question, that the rate fixed by the commission is less than the actual cost of the service required. This must be conceded unless the State is correct in its contention, that the money paid for interest on bonds and dividends must be deducted. These questions are not open to discussion. The authorities hereinbefore cited, settle conclusively the propositions that fixed charges must be paid, that rates are not compensatory which do not permit the carrier to earn sufficient money to pay them, and that the tariff must also permit the company to earn enough to pay *reasonable, adequate* dividends.

The total dividends paid *on the entire railroad*, which extends into three States, amount, as stated, to $294,583.33,—less than three per cent. on the capital stock.

No dividend was included in computing the cost of operating The Minneapolis, New Ulm & Southwestern Division. It was operated at a loss, earned no dividends, and was charged with none. It was an independent corporation. *See testimony of* MR. NAY. *Record, page 63.*

The Pacific Division was only charged with the proportion of the annual dividend, which was represented by that part of the fiscal year during which it was owned by the plaintiff in error (five months), viz: $38,148.55. *Record, page 63.* And the preferred stock, representing $2,500,000, has been retired by bonds which draw interest at 4 per cent., a rate much in excess of the average dividend paid. This interest is now a fixed charge upon the property. This preferred stock is not included in the capitalization.

VIII.

To exclude all dividends from operating expenses would not bring the cost of operating within the revenue which could be earned under the rate made by the commission.

The computation is readily made from the figures in evidence, and gives the following result:

MINNEAPOLIS, NEW ULM & SOUTHWESTERN DIVISION.

Cost of transportation, per ton per mile . . .	3.962 cents.
Revenue (including 30 per cent. arbitrary) . .	2.103 cents.
Net loss, per ton per mile	1.859 cents.

WESTERN DIVISION.
(M. & St. L. R. Co.)

Cost of transportation, per ton per mile, excluding dividend	1.100 cents.
Revenue from commission's rate (Record, page 50)	.779 cents.
Net loss, per ton per mile	.321 cents.

PACIFIC DIVISION.
(W., M. & P. Ry. Co.)

Cost of transportation, per ton per mile, excluding dividends	2.873 cents.
Revenue from commission rate	.800 cents.
Net loss, per ton per mile	2,073 cents.

This computation is readily verified, and is a liberal one to the State, as credit has been given for all arbitraries allowed on the railway accounting between divisions.

It is clear that, although the law is settled that the tariff, to be reasonable, must afford a revenue sufficient to pay a *reasonable, adequate* dividend, the rate in this case would not enable any division, over which the traffic must be transported, to pay operating expenses, *excluding all dividends.*

IX.

In the memorandum filed by the District Court, this language will be found, at pages 111 and 112, of the printed Record:

"I am of the opinion that the defendants have wholly failed to prove that the rates fixed are unreasonable. While it may be the fact that the rates fixed are less than the cost of transportation as claimed by the defendants, the evidence does not show it. *It is perhaps proved that the cost of carrying all freight is greater than the revenue the Minneapolis & St. Louis Company would derive if the rate fixed by the commission for 'coal in car load lots' was to be applied to all freight.* But 'coal in car load lots' is a comparatively insignificant item in the total freight carried by the company, and it must be conceded that the cost of transporting coal in car load lots per ton per mile is considerably less than the average cost for all freight. *It is not only not shown by the testimony what the cost per ton per mile for carrying hard coal in car load lots is, but there is no testimony in the Record that enables me to make even a fair guess as to what it is, or as to whether it is less or greater than the rate per ton per mile allowed under the rates fixed by the commission.* In other words, proof of the cost per ton per mile of transporting all freight furnishes no data from which I am able to estimate the cost per ton per mile of transporting 'hard coal in car load lots.' This cost being unknown, it is impossible to say that the rates fixed by the commission will not yield the company a fair revenue."

Here is a finding that the plaintiff in error has established its case. It is stated that "the cost of *carrying all freight is greater than the revenue which the Minneapolis & St. Louis Company would derive if the rate fixed by the commission for coal in car load lots was to be applied.*" That should determine the case in appellant's favor. The law deals with possibilities, not with impossibilities. To determine the exact cost of transporting the few car loads of coal hauled over these divisions, is impracticable and impossible. There is no method by which it can be done. No accountant on earth can do it. If there are ten cars of silk in a train, and ten cars of hard coal, each car being of the same weight, the cost of hauling the coal would be exactly the same as the cost of hauling the silk. It takes just as much fuel, labor, power and time to transport a ton of coal as it takes to transport a ton of silk. The risk and responsibility are greater in one case, than in the other, but the *cost* is the same. Why it should be conceded that the cost of carrying hard coal is "considerably less than the average cost for all freight," does not appear.

It might, in fact, be much less, and still exceed the tariff fixed by the commission. Hard coal is not, however, in the lowest classification. Many commodities take a lower rate (Record, page 91). If the relator may single out one commodity, and demand that the plaintiff in error shall establish the exact cost of carrying that commodity, as distinguished from all others, and failing, submit to the proposed reduction in rates, the process may be continued and extended to each commodity, until the result will be confiscation. In discussing a kindred question, MR. JUSTICE BREWER says, in the South Dakota Rate Case, *167 United States, 177-8:*

"But here we are confronted by the ninth statement in the findings of fact, to-wit: 'that the court is unable to find from the testimony what the actual cost of earning the local earnings for the fiscal years ending June 30, 1894, 1895, 1896 and 1897 was.' If the court meant by that to say that there was no testimony tending to show what was the cost of doing local business, we are constrained to say that the statement is erroneous, because there was abundance of testimony bearing upon that question. If it meant simply that it could not determine that fact with mathematical accuracy, basing it upon testimony of the exact amount of money paid out for doing such work, it is undoubtedly true; but there are many things that have to be determined by court and jury, in respect to which mathematical accuracy is not possible."

It must be conceded, that the cost of doing local business is greater than that of doing through business. The business of the appellant's railroad system, which is local to the State, is but 25 per cent. of its entire traffic (Record, page 59). The carriage of hard coal to the points named in the schedules is purely local business; and as the small amount transported, is distributed among seventeen stations, and as each car is taken out of one train and put into another train, *at least three times,* as explained by MR. HOPKINS *(Record, page 71), at an actual cost of six dollars per car (Record, page 72),* it is clear that the cost of handling this traffic *is not less than the average, which includes both local and through business.* Mr. Hopkins estimates the cost of handling *local* traffic to be *one hundred and twenty-five per cent. more* than the cost of handling through business *(Record, page 75),*—more than double; but

still *there is no way known to any accountant, nor to any court*, of determining the exact cost of carrying one particular commodity, or of carrying local, as compared with through traffic. The fact is emphasized by MR. JUSTICE BREWER in the South Dakota Rate case, in which he says, *at page 178:*

"Beyond the figures given from the books of the company, of the actual cost of doing the total business of the company, there was testimony of several experts as to the relative cost of doing local and through business. *Such testimony is not to be disregarded simply because it cannot demonstrate by figures the exact amount or per cent. of the extra cost. It is obvious on a little reflection that the cost of moving local freight is greater than that of moving through freight, and equally obvious that it is almost, if not quite, impossible to determine the difference with mathematical accuracy.* Take a single line of 100 miles, with ten stations. One train starts from one terminus with through freight and goes to the other without stop. A second train starts with freight for each intermediate station. The mileage is the same. The amount of freight hauled per mile may be the same; but the time taken by the one is greater than that taken by the other. Additional fuel is consumed at each station where there is a stop. The wear and tear of the locomotive and cars from the increased stops and in shifting cars from the main to side tracks is greater; there are the wages of the employes at the intermediate stations, the cost of insurance, and these elements are so varying and uncertain, that it would seem quite out of reach to make any accurate comparison of the relative cost. And if this is true, when there are two separate trains, it is more so when the same train carries both local and through freight. *It is impossible to distribute between the two, the relative cost of carriage.* Yet, that there is a difference is manifest; and upon such difference the opinion of experts, familiar with railroad business, is competent testimony, and cannot be disregarded."

The South Dakota Rate Case was reversed, by reason of the failure of the trial court to find the cost of the local business. The case is, in principle, "on all fours" with the case at bar. The order of the South Dakota Commission was sustained by the lower court, upon the same ground stated in the memorandum of the District Court of Ramsey County in this case. Sec. 20 of Chapter 110 of the Laws of South Dakota for 1897, provides, like the law of Minnesota, that the

schedule made by the commission shall be received in all courts as *prima facie* evidence that the rates so fixed are reasonable. The trial court gave the same reason for upholding the rate, as is given in this case, viz: that the exact cost of the local traffic involved in the litigation could not be distinguished and determined, and consequently, that it had not been made to appear that it was unreasonable, and violative of the Federal Constitution. This was held to be reversible error. It was held to be the duty of the trial court to make a comparison of the gross earnings from local business, and the cost of doing the business; that it must consider the evidence before it, including the expert testimony, even if there was not evidence by which the cost of the service could be determined with mathematical accuracy, and although the earnings on local and through business could not be accurately or satisfactorily distributed; *and that it is the duty of the trial court, from the evidence before it, to make a specific finding as to the cost of transacting the business involved in the litigation.* Because the trial court failed to do so, the case was reversed. Upon this branch of the case, I quote again from the opinion of MR. JUSTICE BREWER (at page 172), as follows:

"Few cases are more difficult or perplexing than those which involve an inquiry whether the rates prescribed by a State legislature for the carriage of passengers and freight are unreasonable. And yet this difficulty affords no excuse for a failure to examine and solve the questions involved. It has often been said that this is a government of laws, and not of men; and by this court, in Yick Wo vs. Hopkins, 118 U. S., 356, 369, 30 L. Ed., 220, 6 Sup. Ct. Rep., 1064: 'When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power.'

When we recall that, as estimated, over ten thousand millions of dollars are invested in railroad property, the proposition that such a vast amount of property is beyond the protecting clauses of the Constitution, that the owners may be deprived of it by the arbitrary enactment of any legislature, State or nation, without any right of appeal to the courts, is one which cannot for a moment be tolerated. Difficult as are

the questions involved in these cases, burdensome as the labor is which they cast upon the courts, no tribunal can hesitate to respond to the duty of inquiry and protection cast upon it by the Constitution."

X.

The law of Minnesota embodied in Chapter 91, General Laws, 1895, and particularly in subdivisions B, C and D, Section 3, of said Chapter, as well as all laws of said State which assume to confer upon the Railroad and Warehouse Commission the power and authority to compel two or more railroad companies to enter into a joint tariff and to make or adopt a joint rate for the transportation of property over the lines of said company, and which assume to authorize said commission to make a division or apportionment of joint earnings between two or more railroad companies, is violative of the Fourteenth Amendment to the Constitution of the United States.

This question is presented by the third Assignment of errror, by which is is alleged that the Supreme Court of Minnesota, erred:

3. In holding that the law enacted by the legislature of the State of Minnesota, embodied in Chapter 91 of the General Laws of 1895, by which the Railroad and Warehouse Commission of said State is authorized to compel two or more railroad companies to enter into a joint tariff, and make and adopt a joint rate for the transportation of property over the lines of said companies, and which assumes to authorize said commission to make a division of the joint earnings of two or more railroad companies, and to apportion such earnings, is not violative of the Fourteenth Amendment to the Constituton of the United States, in this:

It denies to the plaintiff in error the right to contract in reference to its own business; and thus takes its property without its consent.

It compels the plaintiff in error to enter into involuntary, unreasonable and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue on the part of the plaintiff in error.

It requires the plaintiff in error to enter into involuntary contracts with other carriers.

It assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed.

It requires the plaintiff in error to hire and use the cars and vehicles of other carriers in the transportation of traffic upon its own line.

It deprives the plaintiff in error of the right to make its own contracts with other carriers, and delegates, to a non-judicial body, the right to fix and determine the proportion of a joint through rate, which shall be paid to the plaintiff in error; thereby depriving the plaintiff in error of its property, the right to use the same, and the right to contract in relation thereto.

It denies to the plaintiff in error the equal protection of the laws, which protect and insure to all citizens the right to contract in relation to their property, and deprives the plaintiff in error of its property without due process of law.

It abridges the privileges and immunities of the plaintiff in error as a citizen of the United States, by depriving it of the right to control, conduct and manage its own business.

The chapter referred to reads as follows:

CHAPTER 91.

An Act to amend Chapter ten (10) of the General Laws of eighteen hundred and eighty-seven (1887), entitled An act to regulate common carriers and creating the Railroad and Warehouse Commission, of the State of Minnesota, and defining the duties of such commission in relation to common carriers.

Be it enacted by the legislature of the State of Minnesota:

SECTION 1. That section three (3), of chapter ten (10), of the General Laws of eighteen hundred and eighty-seven (1887), be amended so as to read as follows:

SEC. 3 (A). That all common carriers subject to the provisions of this act, shall provide at all points of connection, crossing or intersection at grade, where it is practicable and necessary for the interest of traffic, ample facilities by track connections, for transferring any cars used in the

regular business of their respective lines of road from their lines or tracks, to those of any other common carrier whose lines or track may connect with, cross or intersect their own, and shall provide equal and reasonable facilities for the interchange of cars and traffic between their respective lines, and for the receiving, forwarding and delivering of passengers, property and cars to and from their several lines and those of other common carriers connecting therewith, and shall not discriminate in their rates or charges between such connecting lines or on freight coming over such lines; but this shall not be construed as requiring any common carrier to furnish for another common carrier its tracks, equipment or terminal facilities without reasonable compensation; that each of said connecting lines shall pay its proportionate share for the building and maintenance of such tracks and switches as may be necessary to furnish the transfer facilities required by this act, and in case they cannot agree on the amount which each line shall pay, then said amount shall, upon application by either party, be determined and adjusted by the Railroad and Warehouse Commission, and either party shall have the right to appeal from the order of said commission, fixing the amount so to be paid, to the District Court of the county where said transfer facilities are furnished, by serving a notice in writing, on the adverse party, within ten (10) days after the making and filing of such order by said commission; and upon the service of such notice there shall be pending in said District Court a civil action for the adjustment and determination of the amount to be paid by each carrier for the expense of the building and maintenance of said transfer facilities. Pleadings shall be made and filed in said action, in conformity to those required by law and rules of practice in said court, and said cause shall be tried in the manner provided for the trial of civil actions in the District Courts of this State.

(B). All railway companies doing business in this State shall, upon the demand of any person or persons interested, or upon demand of the Railroad and Warehouse Commission, establish reasonable joint through rates for the transportation of freight between points on their respective lines within this State.

Carload lots shall be transferred without unloading from the cars in which such shipments were first made, unless such unloading into other cars shall be done without charge therefor to the shipper or receiver of such carload lots, and transfer shall be made without unreasonable delay, under such contract arrangements as such connecting companies may make, or under such rules as the Railroad and Ware-

house Commission may prescribe, as hereinafter provided in this act.

Less than carload lots shall be transferred into the connecting railway cars at cost, which shall be included in and made a part of the joint rates adopted by such railway companies, or established as provided by this act. When shipments of freight to be transported between different points within this State, are required to be carried by two (2) or more railway companies, operating connecting lines, such railway companies shall transport the same at reasonable through rates, and shall at all times give the same facilities and accommodations to local or State traffic as they give to interstate traffic over their lines of road.

(C). In the event of that said railway companies fail to establish through joint rates, or fail to establish and charge reasonable rates for such through shipments, or fail to establish between themselves the rates and terms upon which cars of one company shall be transferred in such through shipments from the line of one company to the other and returned, or fail to provide for the convenient and prompt transfer of such through freight, from the cars of the receiving company to those of the connecting line, it shall be the duty of the Railroad and Warehouse Commission of this State, and said commission is hereby directed, upon the application of any person or persons, interested to establish reasonable joint rates for the shipment of freight and cars over any two or more connecting lines of railroad in this State, and to prescribe the reasonable rules under which any such cars so transferred shall be returned; and in establishing, changing or revising any such rates they shall take into consideration the average of rates charged by said railway companies operating such connecting lines for joint interstate shipments for like distances.

The rates established by said commission shall go into effect within ten (10) days after the same are promulgated by said commission, and from and after that time the schedule of rates so established shall be *prima facie* evidence in all the courts of this State that such rates are reasonable through rates for the transportation of freight and cars upon the railroads for which such schedule shall have been fixed.

(D). Before the promulgation of such rates or rules, as above provided, the Railroad and Warehouse Commission shall notify the railroad companies interested in the schedule of joint rates fixed by them, and they shall give said railroad companies a reasonable time thereafter to agree upon a division of charges provided for in such schedule; and in the event of the failure of the railway companies to agree upon

such divisions and to notify the board of such agreement, said commission shall, after a hearing of the companies interested, decide the same, taking into consideration the value of terminal facilities and all the circumstances of the haul, and the division so determined by the commission shall, in all controversies or suits between the railroad companies interested, be *prima facie* evidence of the just and reasonable division of such charges.

(E). Every unjust and unreasonable charge for the transportation of freight and cars over two or more railroads in this State is hereby prohibited and declared to be unlawful; and every company or person violating the provisions of this section shall be subject to the penalties prescribed in section twelve (12) of the original act to which this act is amendatory.

(F). Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company when its own line of railroad runs to and reaches the point of destination or the point of connection with another railroad on which such point of destination is located, or to use its track or terminal facilities at terminal points for the handling of cars or traffics of another or competing company; provided, that in no case shall the charges for transportation exceed the established through joint rates between any two points.

(G). Whenever any property is received by any common carrier subject to the provisions of this act to be transported from one place to another within this State, it shall be unlawful for such common carrier to limit in any way, except as stated in its classification schedule, hereinafter provided for, the common law liability with reference to such property while in its custody as a common carrier; such liability must include the absolute responsibility of the common carrier for the acts of its agents in relation to such property.

SEC. 2. That subdivision "B" of section nine (9) of chapter ten (10) of the general laws of one thousand eight hundred and eighty-seven (1887) is hereby amended by striking out all after the word "office" in line twelve (12) of said subdivision "B," and substituting therefor the following, to-wit:

Said commissioners shall not, while holding office under this act, be interested in any stock or bonds of any common carrier, or in any contract for the construction, repair or maintenance of any railroad, or accept any retainer or employment from any common carrier under the jurisdiction of said commission.

No vacancy in the commission shall impair the right of the remaining commissioners to exercise all the powers of the commission.

SEC. 3. That subdivision "D" of section fifteen (15) of chapter (10) of the general laws of one thousand eight hundred and eighty-seven (1887), as amended by chapter one hundred and six (106) of the general laws of one thousand eight hundred and ninety-one (1891), is hereby amended by inserting in line two (2) of said subdivision "D," after the word "commission," the words, "Or any party to any proceeding before said commission and affected by its order."

SEC. 4. This act shall take effect and be in force from and after its passage.

Approved April 25th, 1895.

This law denies to this plaintiff in error the right to contract in reference to its own business, and thus takes its property without its consent; it compels it to enter into involuntary, unreasonable and unprofitable contracts with other carriers at the instance of third parties, resulting in a loss of business and revenue; it requires the plaintiff in error to enter into involuntary contract relations with other carriers, designated by third parties; it assumes to fix and enforce the terms and conditions upon which such involuntary contracts shall be performed; it requires the plaintiff in error to hire, and use the cars and vehicles of other carriers, in the transportation of traffic upon its own line; it deprives it of the right to make its own contracts with other carriers, and delegates to a non-judicial body the right to fix and determine the proportion of a joint rate which shall be paid to the plaintiff in error, thereby depriving it of its property, the right to use the same, and the right to contract in relation thereto; it denies to it the equal protection of the laws which protect and insure to all persons the right to contract in relation to their property, and thus deprives it of its property without due process of law; it abridges its privileges and immunities by depriving it of the right to control, conduct and manage its own business.

The authority of the State to compel two or more carriers to enter into a joint tariff, under any circumstances, is denied by this defendant.

That railroad companies are subject to State control,

and reasonable regulation, is conceded. That in some respects such control and regulation goes beyond that which may be exercised over the affairs and business of individuals, is also conceded. Railroad corporations are, however, invested with some rights, personal to the corporation, which are as inviolate as the personal rights of individuals.

It is conceded that the State, acting through its proper agencies, may protect the public against unreasonable and unjust charges for services rendered by railroad companies—may require the business of such corporations to be so conducted as to afford reasonable and proper protection to person and property—may require compliance with all reasonable police regulations, and compel the carrier to furnish adequate and convenient facilities for the transaction of its business with individuals and with the public.

The State, however, cannot deprive the carrier of the right to manage and control its own business. While it must manage its business in conformity with the reasonable regulations and requirements of the State government, it nevertheless retains the right to actually manage and control its own property and business.

By the statute in question the State assumes to take charge of, and control, the business of the plaintiff in error.

The power of the State, to compel the defendant to make reasonable and just charges for transporting coal upon its own line of railway, is one thing. The existence of that power may be safely conceded. The power of the State, to compel the plaintiff in error to enter into a joint through tariff with another carrier is another thing; and such power is denied. One, is a requirement that the plaintiff in error perform the duty to the public (for the performance of which duty it was created); and carry merchandise, over its own line, for a reasonable compensation. The other, is a requirement that it enter into contract relations, with another carrier, involving the exercise of its franchise beyond its own line, and deprives it of the right to fix the terms of the contract to which it is party.

The duty of a carrier to receive and transport all merchandise tendered to it at points upon the line of its own railroad is conceded. The duty, however, is not imposed

until the shipment is tendered. While it is bound to receive all merchandise tendered, it cannot be compelled to contract in advance to do so. The law furnishes the contract; and the contract is that the carrier will receive merchandise tendered for carriage at points upon its own line—that it will transport such merchandise safely to destination, and that it will charge and receive a reasonable conpensation for such service. The charge made may be for all services rendered by itself, and may be reasonable. The charge *may* be *less* than the service is worth; it *must not be more.* A carrier's local rate must not exceed a reasonable charge for the service rendered—if it be so, the rate is unlawful. If the local rate is not unreasonable, and consequently not unlawful, no commission or court can reduce it. The reasonableness of the rate is dependent upon the service rendered—not upon the identity of the shipper nor the ownership of the property transported. If a charge for the transportation of a car load of coal from Minneapolis to New Ulm for an individual shipper residing in Minneapolis, to an individual living in New Ulm, is reasonable and just, the *same* rate is reasonable, and may be collected, if the car load of coal is delivered to us at Minneapolis by the St. Paul & Duluth Railroad Company, and is consigned to a dealer in fuel at New Ulm. If the local rate of $1.25 per ton from Duluth to Minneapolis is reasonable, the value of the service and the reasonableness of the rate is not affected by the fact that, at Minneapolis, the coal is delivered to another carrier, instead of an individual. The local rates are presumed to be reasonable until declared otherwise. In this case, the local rate from Duluth to Minneapolis has been approved by the commission. The local rates of the plaintiff in error has never been questioned or disapproved. If the local rates are reasonable, by what kind of logic can the sum of the locals be held unreasonable, for identical service?

The defendants may severally be compelled to make reasonable *local* rates if they refuse to do so. They have *not* refused. The defendants cannot be compelled to make a joint through rate less than the sum of the two *reasonable* local rates. They may do so voluntarily, but may not be

compelled to do so. *They cannot be forced to contract. That is a personal right.*

Requiring each to carry merchandise over their respective lines of railroad, at a reasonable price, is "regulation" and lawful. Requiring them to render the same service where the same property passes over the same rails, at a less rate, because one receives it from the other, is "confiscation;" and violates the Federal Constitution. It violates the right of the carrier to contract in relation to its own business; which is both a personal right and a property right, and takes our property without due process of law. The State may compel each carrier to transport coal over its line at a reasonable rate; *but the rate cannot be made dependent upon the fact that the traffic does, or does not, originate upon another railroad.* The State cannot compel a carrier to discriminate in favor of traffic received from a connecting carrier. Joint tariffs, and joint rates, are the subject of contract; and cannot be established by compulsion. No carrier can be compelled to enter into a joint tariff or be compelled to join in a through rate.

The power to regulate commerce does not include the power to interfere with private contracts.

Railroad Company vs. Richmond, 19 Wallace, 589, 590.

Every carrier has the absolute right to limit its business to the transaction of business upon its own line. It cannot be compelled to become a party to any arrangement, agreement, contract or tariff concerning the transportation of persons or property beyond the railroad it operates. Its franchises derived from the State are limited to the property it actually controls. Its duties and obligations, as well as its powers, are limited by its charter. The reasonableness of its charges are determined *by the service rendered by it upon its own rails—not by the place where the traffic originated, nor by the question, whether it was tendered for carriage by an individual, or connecting carrier.* A joint tariff, means that the receiving, or initial carrier, may contract for the transportation of property, over the line of the connecting carrier, to destination at the tariff rate; and authorizes it to bind the other carrier to the performance of the contract. The act

under which the order is made, requires the initial carrier to deliver its cars to another company, and requires the connecting carrier to use the cars of another company to the exclusion of its own.

Our proposition of law is this:

The State has no power to compel two or more carriers to make a joint rate or a joint tariff; it has no authority to apportion a joint tariff or rate between the carriers interested.

When the State assumes to do either of these things it assumes to deprive the carrier of the right to contract in reference to its own business—to deprive it of the control of its own property—to interfere with the enjoyment and exercise of its charter rights and franchises, and to compel service without just and adequate compensation; whereby, it deprives it of its property without due process of law. It denies it the equal protection of the law, and violates the Fourteenth Amendment to the Federal Constitution.

Mr. Justice Field held, in *Oregon Short Line, etc., Co. vs. Northern Pacific R. R. Co., 51 Fed. Rep., 470 (affirmed at 9. C. C. A. page 409)*, that neither at common law, nor under the Interstate Commerce Act, can a railroad company be compelled to haul the cars of another company over its line, if it has cars of its own, which it desires to use for the transportation of traffic; nor can one carrier be required to advance or assume payment of the freight charges due a preceding carrier. Such matters are regulated by contract.

It is held in *Railway Co. vs. Railway Co., 41 Fed. Rep., 562*, that a court cannot require a railroad company to contract with another carrier, engaged in like traffic, for a joint through routing and joint through rate, nor can the court make such a contract for the parties.

And see:

Railway Co. vs. Osborn, 52 Fed. Rep., 914;
Railway Co. vs. Railway Co., 59 Fed. Rep., 400;
Kentucky & I. Bridge Co., 37 Fed. Rep., 625;
Railway Co. vs. Railway Co., 41 Fed. Rep., 559.

One carrier cannot constitute itself the agent, to collect advance charges, for another. The State cannot compel one

carrier to permit another carrier to act as its agent, in receiving shipments, advancing or collecting charges, selecting routes, contracting for transportation, or controlling and managing its rolling stock.

I have been unable to find that any court of last resort has heretofore committed itself to the proposition that a State is invested with a power so arbitrary. It is true that the Supreme Court of Iowa in the case of *Railroad Co. vs. Dey et al., Railroad Commissioners, 82 Iowa, pages 312, 338,* held in favor of the validity of a similar act. But the same court, in the same case, upon a second appeal, disapproved that holding. While it was held that, upon the second appeal, the ruling first made must stand as the law of *that case,* the Court said:

"In thus disposing of this case, we are not to be understood as approving of the correctness of the former holding. Some of us are content with the result reached in the former opinion; others, the writer included, do not approve of some of the reasons and conclusions found in the opinion rendered by a majority of the court as then constituted, and do not wish to be considered as bound by it in any other case."

See 89 Iowa, page 25.

A statute like this was was held by the Supreme Court of Nebraska to be violative of the Federal Constitution.

State ex. rel. Board of Transportation vs. Railroad Co., 46 Nebraska, page 682.

Mr. Justice Field, in *County of Santa Clara vs. Southern Pacific R. R. Co., 18 Fed. Rep., 406,* said:

"The doctrine of unlimited power of the State over corporations, their franchises and property, simply because they are created by the State, so frequently and positively affirmed by counsel, has no foundation, whatever, in the law of the country. By the decision of the Supreme Court of the United States in the Dartmouth College Case, it was settled, after great consideration, that the charter of a corporation, under which its franchises—its capacity to do business and hold property is conferred, is a contract between the corporators and the State, and therefore within the protection of the Federal Constitution prohibiting legislation impairing the obligation of contracts. So far from the State

having unlimited control over the franchises and property of corporations, because of its paternity to them, it has under that decision *only such as it possesses over the contracts and property of individuals.*"

The State statute can only be made effective by interference with the right of private contract. When two railroad companies have voluntarily connected their lines of railroad, and entered into an arrangement for the transfer and continued transportation of traffic, the independent line thus voluntarily created, is subject to the same degree and character of State regulation, as other lines. The question of *regulation* of a joint line voluntarily created, and the compulsory *creation* of such lines, are distinct. If two individuals enter into a co-partnership, such co-partnership is subject to all laws regulating co-partnerships. It does not follow that the individuals can be compelled to form the co-partnership.

It is settled, beyond argument, that, at common law, two carriers cannot be compelled to enter into contracts by which one can be compelled to haul the cars of the other, or to make joint tariffs with the other, or advance the charges earned by the other.

The remaining question is as to the power of the legislature to compel that which may not be done by the courts under the common law. This power is limited by the constitution. By the terms of the act in question, the carriers are required to establish joint rates for through shipments, and for the transfer of cars and freight. If they fail to do so, the act assumes to delegate to the Railroad and Warehouse Commission the power to do so.

We deny that such power can be delegated to the commission, because it is a power which the State, itself, does not possess. It goes beyond the establishment of a uniform maximum rate for railroad transportation. It is the establishment of *contract relations* between two companies, and the rates and terms under which two designated carriers must do business, not only with the public, but with each other.

The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot be taken away.

Frorer vs. The People, 141 Illinois, page 181;
Braceville Coal Co. vs. The People, 147 Illinois, page 71;
Harding vs. The People, 160 Illinois, page 65.

The authority of the State does not extend to intermeddling with the contract relations between carriers, *nor establishing rates for the transportation of particular commodities over one section of a carrier's railroad; nor fixing a special rate for the transportation of traffic originating upon the line of a particular carrier.* Its authority is limited to making a *uniform* rate applicable to *all* lines and *all localities;* variable only by existing conditions, the existence of which must be shown.

The commission cannot select a certain section of the carrier's property, and fix a rate for transporting, over it, a certain commodity, originating on the line of another carrier; and compel the terminal carrier to accept as compensation for transporting that commodity, a sum less than its existing reasonable local rate, for the same service.

The Fourteenth Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, necessary and essential to his carrying out the purposes above mentioned. These rights are inalienable.

United States vs. Sweeney, 95 Fed. Rep., 450;
Allgeyer vs. Louisiana, 165 U. S., 589;
United States vs. Sweeney, 95 Fed. Rep., 450.

Corporate rights, and individual rights, are alike entitled to the equal protection of the laws, which are framed to effectuate the principles declared as the basis of our right to self-government and independence. The declared purpose of the State is to deprive the appellant of the right to make its own contracts, select its own connecting carriers, agree

upon the division of joint earnings, and manage its own railroad. It proposes to create traffic contracts, by which the plaintiff in error can be compelled to divide its earnings, and its business; to compel it to enter into joint tariffs, and render service without compensation.

XI.

The fourth assignment alleges that the State court erred:

"In holding that the law of the State of Minnesota, by which it is held, that in estimating and computing the cost of operating a railway, per ton of freight, per mile of carriage, for the purpose of determining the reasonableness of a tariff of rates, it is error to take into consideration any part of the earnings applied to the dividends upon the capital stock of such railway, does not violate the Constitution of the United States."

The question directly presented by this assignment, was considered and argued in the second subdivision of this brief, in connection with the first and second assignments of error. It resolves itself into this: Is a railroad carrier, as a matter of legal right, entitled to earn and receive *some* profit upon its invested capital? The question was answered in the affirmative, by MR. JUSTICE MCKENNA, in the case of *Southern Pacific Company vs. Board of Railway Commissioners, 78 Federal Reporter, 236*, hereinbefore cited.

The question involved in the case at bar, is as to the right of the carrier to earn *any* dividend; not the amount of dividend.

XII.

The act of the State Legislature is violative of Section 10, of Article I, of the Constitution of the United States. It violates the Charter Contract with the Plaintiff in Error.

The legal duty of the plaintiff in error is commensurate with its franchise; its franchise is confined to the transaction of business on its own line of of road, and cannot be made to extend beyond it.

The People of the State of Illinois, ex rel. Hempstead vs. The Chicago & Alton Ry. Co., 55 Ill., 95.

The case cited, also recognizes, and asserts the proposition that two parties cannot be compelled to contract.

A railroad company is guaranteed, by its charter, the right to build a railroad and—having built it—the right to operate it. The purpose of the construction of a railroad is to earn money. Its methods of earning money are limited to the carriage of passengers and freight. The value of its property, including its franchise, is dependent upon its earning capacity. As the value of its property, its solvency and its existence are dependent upon its earnings, its charter contract gives it the legal right to charge and collect a tariff which will afford it reasonable compensation for the service rendered. The charter includes a contract, that the State, which grants it, will not destroy the value of the carrier's property by compelling it to render service without just and reasonable compensation.

Coke Company vs. Cleveland, 71 Fed. Reporter, 610.

The State of Minnesota by this act assumes:

1. To compel two railroad companies to make a joint rate for the transportation of traffic. *Sec. 3 (B), Act of 1895.*

2. To compel the initial carrier to deliver its cars to the competing line; or, as an alternative, to transfer car loads of freight into the cars of the other company without charge. *Sec. 3 (B), Act of 1895.*

3. To compel the initial carrier to transfer less than car load lots, at cost. *Sec. 3 (B), Act of 1895.*

4. To compel the connecting carrier to hire the cars of the competing initial carrier, for the continued transportation of the goods.

Subdivision "F" of Section 3, of the act, provides as follows:

"(F). Nothing herein contained shall be construed as requiring any railroad company to send its cars over the line of railroad of another company, when its own line of railroad runs to and reaches the point of destination or the

point of connection with another railroad on which point of destination is located; or to use its track, or terminal facilities at terminal points, for the handling of cars or traffic of another or competing company; *provided*, that in no case shall the charges for transportation exceed the established through joint rate, between any two points."

Under the provisions of this section, the plaintiff in error is relieved from delivering its cars to its competitor; but, as an alternative, is subjected to the burden of transferring their contents into the cars of the connecting carrier without compensation; the tariff being carefully limited, by the proviso, to the "through joint rates."

This requirement, by which the plaintiff in error is required to render service, in making such transfer, without compensation, constitutes a violation of the charter contract and deprives it of its property without due process of law.

XIII.

The fifth assignment of error alleges that the Supreme Court of Minnesota erred:

"5. In holding that the State law, which, under the guise of a so-called 'commercial necessity,' assumes to compel railway carriers to transport freight over their lines of railway for a rate less than the actual cost of such service, does not violate the Fourteenth Amendment to the Federal Constitution, by depriving such carrier of its property without due process of law, and by denying the equal protection of the laws, which insure to all citizens the right to earn, and receive, a reasonable compensation for service rendered, and a reasonable profit over and above the actual reasonable cost of such service."

The questions presented by this assignment have been discussed.

The sixth assignment, which asserts the right of the plaintiff in error to earn a dividend equal to the rate of interest recoverable by statute, in the absence of contract, need not be separately discussed, as the decision rests upon the proposition that *all* dividends and *all* profits should be excluded. The position of the plaintiff in error may be

stated as follows: Proof that a rate of interest, less than the statutory rate, is customarily accepted as fair compensation for the use of invested capital, might warrant a finding to that effect; but, in the absence of all proof, the statutory rate or interest is, *prima facie*, reasonable, and is not excessive.

XIV.

The seventh and ninth assignments of error may be considered together. These assignments allege error upon the part of the State court:

"7. In holding that the State of Minnesota, acting through its Railroad and Warehouse Commission, has the right, power and authority to compel the plaintiff in error to enter into a joint rate, or make and perform an agreement, with another carrier, for the transportation of property over the lines of both companies."

"9. In holding that the State of Minnesota has the right, power or authority to make and enforce a law which declares and determines the manner and proportion in which money earned, by two or more carriers, in transporting merchandise over two, or more, connecting lines, shall be divided between the several carriers."

These questions have been, to some extent, considered in the argument of the third assignment of error, in the eighth division of this brief.

If this law is upheld, it means that a railroad carrier may be deprived of the control of its own business. A *joint* rate, means a single through rate for transportation, from a point of origin upon one railroad, to a point of destination upon another railroad. There may be one or more intermediate carriers. The independent route, thus established by the State, may include parts of several distinct and independent railroads.

Many perplexing questions are presented by the enforcement of this law. Conditions are created which are irreconcilable with individual rights. In the case at bar, the order of the commission fixes a definite, specified sum, as the rate, per ton, for transporting coal, *in car loads*, from Duluth to

certain designated stations upon the railroad of the plaintiff in error, and to certain other designated stations upon the railroads of other carriers, *who are not parties to the proceeding.*

The St. Paul & Duluth Company deducts, from the through rate, one dollar per ton, for the service rendered in transporting the coal from Duluth to Minneapolis. The remainder of the rate, in excess of one dollar per ton, *is to be paid to the plaintiff in error*, as full compensation for transporting the shipment *to destination.* See page 28, printed Record, paragraph 31. This obliges the plaintiff in error to make settlement, from the sum paid to it, with the connecting carrier upon whose line the point of destination is situated. Of the twenty-eight stations, designated by the order, *fifteen* are situated upon the railroad of the plaintiff in error; *three*, upon the Minneapolis, New Ulm & Southwestern Railroad, and *ten* upon the Wisconsin, Minnesota & Pacific Railroad. As neither of the two last named railroad companies are parties to this proceeding, they may each demand and receive their full reasonable local rates for transportation over their own railroads. The order of the commission does not assume to divide the rate, between the plaintiff in error and the terminal carriers, although thirteen of the twenty-eight stations designated are situated upon other railroads. While it is true that the plaintiff in error owned the stock of the Minneapolis, New Ulm & Southwestern Company, it is also true that the Wisconsin, Minnesota & Pacific Company, upon whose railroad *ten* of the designated stations are situated, is in every particular, including ownership, control and operation, wholly independent.

The fact that the plaintiff in error owned the stock of the Minneapolis, New Ulm & Southwestern Company, does not make it responsible for its management.

Pullman Car Company vs. Missouri Pacific Co., 115 United States, 587, 597;

Fitzgerald vs. Missouri Pacific Co., 45 Federal Reporter, 812, 818-819;

Farmers Loan & Trust Company vs. Chicago, P. & S. Ry. Co., 39 Federal Reporter, 143; 157;

Atchison, Topeka & Santa Fe R. R. Co. vs. Cochran, 43 Kansas, 225;
Winona & St. Peter Railroad Company vs. St. Paul & Sioux City Railroad Company, 23 Minn., 359;
Richmond & I. Construction Co. vs. Richmond, N. I. & B. Co., 68 Federal Reporter, 105, 108.

The petition for the alternative writ of mandamus is directed to the through transportation of hard coal, from Duluth to the stations designated, *in car load lots.* (Record, page 16). The order of the commission, and the judgment of the State Court, require the plaintiff in error to (1) receive the coal in the cars of the initial carrier; (2) accept the joint rate fixed by the order and judgment; (3) accept the division and proportion of the joint rate, made and fixed by the commission; and, (4) out of its proportion of the joint rate, settle with and pay the terminal carriers, who are not parties to this proceeding.

Compliance with the order, practically deprives the plaintiff in error of the control of its own property. If the State is to control the movement of cars, compelling a carrier to surrender its rolling stock to its connecting carriers, without regard to their solvency, or its own need for its cars, in its own service; fix the rates to be charged; determine what proportion of the rate each carrier shall have; compel one carrier to act as agent for collecting the earnings of another; permit other carriers to make its collections, there is little left to a railroad corporation by way of supervising its own business. If a carrier uses the cars of a connecting line, it must pay for their use, though its own cars stand idle. If it refuses to use the cars of the initial carrier, it must transfer the merchandise at its own cost and expense. If it delivers its cars to an irresponsible and insolvent line, they may be lost. The initial carrier cannot compel the connecting carrier to pay its charges, nor can the initial carrier be obliged to collect in advance and account for the earnings of another railroad company; one carrier cannot be *compelled* to contract to deliver shipments beyond its own line.

In *Illinois ex rel. Hempstead vs. Railway Company, 55 Ill., 95*, it is held that:

"Railroad companies cannot be compelled, as common carriers, to receive goods at stations along their line, for transportation, on the requirement of the consignor that they shall, themselves, deliver the goods at a point beyond or off their own line of road; or to deliver goods received by them for transportation, at such point. The legal duty of the companies, in that regard, is commensurate only with their franchise; it is confined to their own line of road, and cannot be made to extend beyond it."

This law requires it. If the order of the commission, and the law under which it is made, cannot compel a carrier to contract for carriage, and make delivery beyond its own line, both the order and the law must fail. If enforced, railroad carriers are obliged to exercise their franchises beyond their own property, by contracting for delivery upon other railroads and by sending its own cars over other lines. *The law requires carriers to do, and to undertake to do business upon the railroads of other carriers.* Under the provisions of this chapter, we find that we have all the railroads of the State united in *one* system. Rates fixed by the State; points of connection and transfer fixed by the State; movement of rolling stock directed by the State; earnings divided by the State; competition prevented by the selection of routes and fixing of rates by the State; the creation of new lines of transportation by the State, composed of sections of existing independent lines.

Property has value in proportion to its productiveness. Productiveness is dependent, largely, if not wholly, upon control. The right of control is the most valuable incident to the ownership of property. This statement is particularly true, as applied to income-producing property. As applied to railroads, which are created, constructed and operated with the sole purpose of producing revenue, the statement is axiomatic. To deprive a railroad company of the power to control its own property, to take away its right to select the carriers with which it will enter into traffic contracts; to deny it the right to avail itself of the best bargain it can make in the way of division of joint earnings, where

competition between connecting carriers makes it possible to contract to its own advantage; would diminish, and in many cases destroy the value of the property. Railroads are operated upon business principles; and in order to operate them safely and remuneratively, their managers must have the same freedom to contract, and to take advantage of business and commercial conditions, as that possessed by an individual in his personal and smaller business.

One of the most important incidents of railway operation, is the making of judicious traffic contracts with other carriers. Railroad corporations, like individuals, have the right to choose their own business associates. The responsibility of the connecting carriers, their methods of doing business, the manner in which the joint earnings are divided, etc., are matters which figure prominently in traffic agreements. No law which presumes to compel a carrrier to enter into involuntary contract relations with another, is valid. If two or more carriers, by voluntary arrangement, create a joint line composed of parts, or all, of the railroads of the several carriers, the State may see that the rates charged for transportation over such joint line, are reasonable. It cannot determine how such joint earnings shall be divided between the carriers. That is a matter of private right, with which the State has no concern. If the shipper pays no more than a just and fair rate, it is immaterial to him, or to the public, how the earnings under such joint rate are divided. No legal excuse, or occasion, can arise for the exercise of the assumed power to enforce the making of a joint tariff. The local rate of each carrier must be reasonable. This, the State compels. Every carrier must accept merchandise tendered to it for carriage. This, the law compels. The sum of two reasonable local rates cannot be unreasonable. The shipper can therefore have his goods transported at reasonable rates, without a joint through rate. The carriers may make a joint rate; they cannot be compelled to do so. They may make a joint through rate less than the sum of the reasonable local rates; they cannot be compelled to do so. Each, or either, may contract to accept and use the rolling stock of the other; each or either, may contract to send its cars over the tracks of the other; it cannot be compelled to

do so. These are all matters of private contract. The right of a citizen to contract, relative to his own business, is both a property right and a right of personal liberty, and cannot be taken away.

The Fourteenth Amendment to the Federal Constitution secures, not only the right of the citizen to be free from mere physical restraint of his person, but to be free in the employment of all his faculties; to use them in all lawful ways; to live and work where he will, and earn his livelihood in any lawful manner; to pursue any livelihood or avocation, and for that purpose to enter into all contracts that may be proper, necessary and essential to his carrying out the purposes above mentioned. These rights are inalienable.

United States vs. Sweeney, 95 Fed. Rep., 450;
Allgeyer vs. Louisana, 165 U. S., 589.

There are certain fundamental rights, possessed by every citizen, which are recognized in the organic law of every State. A statute which violates any of these rights is unconstitutional and void. The right to acquire and possess property includes the right to contract. This right is not created or conferred by the constitution. It is one of those fundamental rights, older than any written law, the existence of which is pre-supposed, as the basis of political government. It is one of those existing and fundamental rights, the continuance of which is guaranteed by the constitution; not created by it. The owner of property has a right to its independent enjoyment, subject only to the reasonable regulation necessary to prevent its use to the injury of others. This cannot be had, if he be deprived of the right to contract in relation to its use.

"The law of contracts," says Mr. Parsons, "may be regarded as including nearly all the law which regulates the relations of human life. Indeed, it may be looked upon as the basis of human society. All social life presumes it, and rests upon it; for out of contracts grow all rights, all duties, all obligations, and all law." The exercise of the right to contract, enters into every transaction of business or social life, and cannot be limited or controlled by legislation, ex-

cept where its exercise conflicts with public policy, or is violative of law.

The effect of the statute under consideration is to deprive the plaintiff in error of the right, (1) to control its own business; (2) to make its own traffic contracts; (3) to select the carriers with whom it will enter into traffic agreements; (4) to determine whether or not it will join other carriers in the creation of joint lines; (5) to charge and collect its own reasonable local rate for the transportation of property over its own line, to the point of intersection with the road of a connecting carrier; (6) to determine and decide whether or not it will deliver its own rolling stock to a connecting carrier for use upon other railroads; (7) to select the connecting carrier to whom it will deliver goods committed to its care for transportation beyond its own line; by reason of which it is without security for the safety of goods, or its own charges for transportation.

XV.

By the eighth assignment, it is alleged that the State Court errred in this:

"In holding that the State of Minnesota has the right, power or authority to make and enforce a law, by which two connecting carriers may be compelled to transport shipments, passing over two or more lines, for a less, or different rate or tariff than the sum of the reasonable local rates, or tariffs, of the several carriers."

The local tariff of the St. Paul & Duluth Railroad Company, the initial carrier as to the traffic involved in this case, for the carriage of hard coal from Duluth to Minneapolis, is $1.25 per ton. *This was admitted to be a reasonable rate, and was adopted, by the commission, as the basis for the joint through rate.* See testimony of Ira L. Mills, chairman of the Railroad and Warehouse Commission, page 76 of the printed Record. It is admitted that the local rates of the plaintiff in error, for transporting coal, from Minneapolis to the various stations designated, was considerably in excess of the balance of the joint rate, made by the commission, after deducting the proportion awarded the St. Paul & Du-

luth Company. The result of the enforcement of the order of the commission is this: (1) it is admitted that $1.25 per ton, is a reasonable local rate for transporting coal from Duluth to Minneapolis, over the St. Paul & Duluth Railroad, *which does not extend beyond Minneapolis;* (2) the right of that company, to charge and collect $1.25 per ton, for that service, is conceded, by the commission and the State; (3) but if the coal is carried beyond Minneapolis, *on another railroad,* the St. Paul & Duluth Company, the *same carrier,* is required to accept a reduction of 25 cents per ton; 20 per cent. of the *reasonable* local rate, *for exactly the same service.* Following the case further: The plaintiff in error may transport coal from Minneapolis to any of the designated stations, and charge for such service its regular local rates, *the reasonableness of which are not questioned.* If it receives *the same coal* from the St. Paul & Duluth Company, at the same point (Minneapolis), and transports it to the same destination, it must accept less compensation *for the same service,* simply because it received the shipment from the Duluth Company. The sum of two *reasonable* local rates, *cannot* be unreasonable. There has been much litigation to establish the right of carriers to make a lesser proportionate rate for a long haul, where the both hauls have been over the same railroad. In Iowa, plaintiff in error has to look to the statute (Sec. 2152, Code of Iowa, for 1897) for *permission* to make a joint rate which is less than the sum of the local tariffs; yet, the State of Minnesota assumes to determine, that two reasonable local rates make an unreasonable joint rate, the service rendered by the several carriers being identical in each case; and the service rendered by each, being confined to its own road. The enforcement of this statute deprives the plaintiff in error of the right to contract in relation to its own business, a right which is both a personal right and a property right, and cannot be taken away. It denies the equal protection of the laws and takes its property without due process of law.

XVI.

The enforcement of the order of the Commission will oblige the Plaintiff in Error to discriminate in favor of certain localities, and citizens, as against other localities and citizens.

This question is presented by the tenth and eleventh assignments of error, by which it is specified that the State Court erred:

"10. In holding that the State of Minnesota has the right, power or authority to make and enforce a law whereby a railroad carrier may be compelled to transport traffic originating upon the line of another railroad, designated by the Railroad and Warehouse Commission, at a different and less rate than it may lawfully collect and receive for the same service, where the traffic originates upon its own line; thereby forcing defendant (plaintiff in error) to give a preference and discriminate in favor of certain traffic and certain localities.

11. In holding that the State of Minnesota has the right, power or authority to make and enforce a law, whereby a railroad carrier may be compelled to charge and collect different rates, per ton, per mile, for traffic originating upon other railroads, from that collected for traffic local to its own railroad; notwithstanding the service rendered is identical."

Both state, and interstate law, forbids discrimination.

Section 2, of Chapter 10, General Laws of Minnesota for 1897, reads as follows:

"SEC. 2 (a). That all charges made by any common carrier, subject to the provisions of this act, for any service rendered or to be rendered in the transportation of passengers or property, as aforesaid, or in connection therewith, or for the receiving, delivering, storage or handling of such property, shall be equal and reasonable; and every unequal and unreasonable charge for such service is prohibited and declared to be unlawful.

Provided, That one car load of freight of any kind or class shall be transported at as low a rate per ton, and per ton per mile, as any greater number of car loads, of the same kind and class from and to the same points of origination or destination.

(b). It shall be unfawful for any common carrier, subject to the provisions of this act, to make or give any un-

equal or unreasonable preference or advantage to any particular person, company, firm, corporation or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation or locality, or any particular description of traffic, to any unequal or unreasonable prejudice or disadvantage in any respect whatsoever."

In the face of this positive, statutory prohibition, the order of the commission compels discrimination.

A train laden with hard coal, in car loads, starts from Duluth and stops at Minneapolis; one-half of the cars are delivered on the track to a local dealer or consumer; the local rate of $1.25 per ton, can lawfully be collected. The balance of the cars, in the same train, are delivered to the plaintiff in error, for transportation to some one, or more, of the stations named in the order of the commission; upon these cars the tariff collected for identical service, is *one dollar* per ton.

Hard coal is within the appellant's local classification "D." (Record, page 91.) Upon a shipment of hard coal which originates in Minneapolis, it can charge the consignee, or the shipper, its regular local rate; if it receives the same coal from the St. Paul & Duluth Company, at Minneapolis, and transports it to the same destination, it can charge only the rate fixed by the commission. Coal received from the St. Paul & Duluth Company must be carried at one rate; coal received from a local dealer at Minneapolis, at another rate. Coal delivered to the plaintiff in error pays a rate of $1.00 per ton from Duluth to Minneapolis; coal delivered to a Minneapolis dealer pays $1.25 per ton from Duluth to Minneapolis. The rate fixed by the commission, for hauling a ton of hard coal from Duluth to Minneapolis, is not made dependent upon the service rendered, nor the cost or value of the service; it is made dependent upon the identity of the consignee, or the person to whom it is delivered. It is held by the State Court, that a carrier must charge less for the transportation of coal delivered to a connecting carrier, than for the same coal, hauled in the same car, over the same rails, in the same train, if delivered at the same place, to an individual. It is held, by the State Court, that the plaintiff in er-

ror may charge its local rate for transporting a car of coal from a dealer in Minneapolis to a dealer in Boyd, and a less rate for hauling the same car load, if received at Minnneapolis from its co-defendant. This is plainly unlawful discrimination.

Lake Shore, &c., Railway vs. Smith, 173 United States, 690, and succeeding pages.

The reasonable local rate, made by a carrier, is held, by the commission, to become unreasonable, if the traffic is forwarded beyond its line, over the road of another carrier.

The commission has made an order, which is utterly indefensible from any standpoint. If the local rates of the several carriers are reasonable, the sum of the locals is not unreasonable; the combined service being identical with the service rendered, by them, severally.

XVII.

The twelfth assignment alleges that the State Court erred:

"In holding that the evidence does not show, conclusively, that the cost of the service required by the State, through its Railroad and Warehouse Commission, is greater than the revenue to be derived from the proportion of the joint rate awarded to the plaintiff in error."

The State Court held, that in estimating the cost, per ton, per mile, of transporting freight, for the purpose of determining the cost of operation, no allowance must be made for dividends. This question was determined, in favor of the contention of the plaintiff in error, in the *Southern Pacific case, 78 Federal Reporter, page 236*, the opinion being by Mr. Justice McKenna, at Circuit.

The State Court has based its estimate of the cost of operation, upon an average cost of doing *all* business; both State and interstate. This is contrary to law, and the decisions of this Court. Such a rule devotes the revenue from interstate business to the payment of the cost of transacting local business. The State Court utterly disregards and ignores the positive and direct testimony, that the cost of the

service required is much greater than the revenue returned by the tariff, fixed by the commission. *This testimony is uncontradicted; the method of computation is conceded to be correct; and was accepted and adopted by the State's accountant,* MR. YAPP. (Record, page 106.) To escape the inevitable result of the computation, the accountant excluded interest on bonds and dividends; both of which are proper items. More than this: *if all dividends paid, were excluded; still the tariff, fixed by the commission, would not equal the admitted cost of operation.* (Ante, pages 34, 35.) The record contains no evidence which tends to contradict the claim, and evidence, of the plaintiff in error, that the cost of service exceeds the possible revenue, to be derived therefrom, under the order of the commission.

XVIII.

By the thirteenth assignment of error, it is alleged that the State Court erred:

"In holding that in order to show that the rate fixed by the Railroad and Warehouse Commission is unreasonable, the plaintiff in error is bound to show the exact cost of transporting *each particular commodity;* and that such fact is not established by proof that the cost per ton, per mile, of transporting *all* merchandise is more than the rate per ton, per mile, fixed by the order of the commission."

I again call attention to the memorandum of the District Judge, at pages 111-112 of the printed Record, in which he says:

"While it may be the fact, that the rates fixed are less than the cost of transportation, as claimed by the defendants, the evidence does not show it. *It is, perhaps, proved that the cost of carrying all freight, is greater than the revenue the Minneapolis & St. Louis Company would derive, if the rate fixed by the commission for "coal in car load lots" was to be applied to all freight.* But "coal in car load lots" is a comparative insignificant item in the total freight carried by the company; and, it must be conceded, that the cost of transporting coal in car load lots, per ton, per mile, is considerable less than the average cost for all freight. It is not only (not) shown by the testimony what the cost per ton, per mile, for

carrying hard coal, in car load lots is, but there is no testimony in the record, which enables me to make even a fair guess as to what it is; or as to whether it is less, or greater than the rate, per ton, per mile, allowed under the rate fixed by the commission. *In other words, proof of the cost per ton, per mile, of transporting all freight, furnishes no data from which I am able to estimate the cost, per ton, per mile, for transporting "hard coal in car load lots."* This cost being unknown, it is impossible to say that the rates fixed by the commission will not yield the company a fair revenue."

This conclusion, reached by the district judge, seems to have been accepted and adopted by the State Supreme Court. The proposition, that any carrier can determine the exact cost of carrying each particular commodity, is too absurd for argument. It is disposed of, by the opinion of MR. JUSTICE BREWER, in the *South Dakota Rate Case, 176 U. S., pages 177-8*, which has been quoted in the ninth sub-division of this brief, at page 37.

XIX.

The fourteenth assignment, alleges error by the State court:

"In holding that there was not competent and sufficient evidence of the capitalization, cost and value of the railroad of the plaintiff in error."

The State Court held, upon this question, that proof had not been made under the rule established by that court in the *Steenerson Case, 69 Minn., 353;* but proof was made under the rule established in the *Ames Case, at 64 Federal Reporter, page 177.* The State Court does not question the relevancy or competency of the evidence offered, and received. It does not question the correctness of the rule declared in the Ames case (supra); it is not denied that there is more than one way to prove the value of railroad property; nor is it denied that the evidence introduced and received was pertinent and competent. It was said in the *Ames Case* (64 Fed. Rep. 177), that

"It is not easy to always determine the value of railroad

property; and if there is no other testimony, in respect thereto, than the amount of the stock and bonds outstanding, or the construction account, it may be fairly assumed that one or the other, of these, represents it; and computation as to the compensatory quality of rates, may be based on such amount."

In the case at bar, the plaintiff in error proved the amount of stock and bonds outstanding; it also proved the cost of the property up to June 1st, 1899. If the evidence as to the cost of the property, at that time, be excluded, we still have proof, competent and uncontradicted, made strictly in accordance with the rule above stated. No evidence was offered, by the defendant in error, as to the value of the property. The case rests, upon that issue, upon the uncontradicted testimony of the auditor of the railroad company, showing the amount of outstanding stock and bonds, and the cost of the property up to June 1st, 1899.

XX.

Questions, as to the reasonableness of the dividends paid, and comparison of rates, are, in this case, incidental. The propositions upon which the plaintiff in error, confidently, relies for a judgment of reversal, are as follows:

A carrier has the absolute right to receive compensation for services rendered, equal, at least, to the actual, reasonable, cost of the service required and rendered.

The fact that the total earnings of an interstate railroad exceed the cost of transporting all traffic, furnishes no reason for requiring business, local to the State, to be done under a tariff which fails to afford a revenue equal to the actual, reasonable, cost of the service rendered. Earnings on interstate business cannot be considered, in fixing the cost of transportation, local to the State.

A State has not the power to arbitrarily establish a rate for transporting a single, specified commodity, between certain designated stations. Its authority is limited to the establishment, and enforcement, of reasonable rates, uniform, in application and operation, upon the entire railroad; if not to all railroads within the State.

The State cannot compel a carrier to accept a compensation less than its reasonable local rate, by reason of the fact that the shipment originates upon, or is destined to a point upon the line of another railroad; the service rendered being identical. If the local rate is reasonable, it is not made unreasonable because the traffic originated upon the road of another carrier.

A State cannot compel a carrier to transport a commodity, received from a connecting carrier, at a less, or different rate, than the rate it is permitted to collect from its own direct patrons, for identical service, rendered in transporting the same commodity, between the same points.

In estimating the cost of transportation, the carrier may include interest upon its bonded indebtedness, and a reasonable dividend.

The fact that a carrier has been able to pay a dividend, from earnings upon business not local to the State, furnishes neither reason or justification for a local tariff, under which earnings upon local business are insufficient to defray the actual cost of doing the business.

A State cannot establish a through joint rate, over the lines of independent carriers, against the objection of such carriers.

A State cannot apportion, or divide, joint earnings, between carriers. Such action is judicial, and beyond the authority of the commission.

A State cannot compel two or more carriers to accept a joint rate, less than the sum of their respective reasonable local rates, for identical service.

I respectfully ask for a reversal of the judgment of the State Court.

ALBERT E. CLARKE.